114-120
120-149

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 200.

J. ADDISON HAYES, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

FILED APRIL 29, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 200.

J. ADDISON HAYES, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI.

INDEX.

	Original.	Print.
Writ of error	1	1
Caption	3	1
Bond	4	1
Citation	6	3
Declaration	8	3
Summons	16	8
Marshal's return	17	8
Order granting time to plead	18	9
Demurrer	18	9
Judgment	20	10
Clerk's certificate	21	11
Opinion	22	11

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States in and for the northern district of Mississippi, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court before you, between J. Addison Hayes, plaintiff, and the Mayor and Aldermen of the city of Holly Springs, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1882, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said district court at Oxford, this 15th day of March, A. D. 1882, and 107 year of American Independence.

[SEAL.]

G. R. HILL,
Clerk of said Dist. Court.

2 [Endorsed:] No. 3538. District court of the United States, northern district of Mississippi. Writ of error. J. Addison Hayes *vs.* The Mayor & Aldermen of the city of Holly Springs. Issued the 15 day of M'ch, A. D. 1882. G. R. Hill, clerk. Estes & Ellet, att'ys.

3 UNITED STATES DISTRICT COURT,
Northern District of Mississippi:

Proceedings had in the district court of the United States for the northern district of Mississippi, begun and held for its December term, A. D. 1881, at the court-house in Oxford, Miss., on, to wit, the 28 day of Nov., 1881, and days subsequent thereto, in the following cause:

J. ADDISON HAYES, Plaintiff,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS,
Defendant.

Estes and Ellett, of Memphis, Tenn., att'ys for plaintiff, and Featherston & Harris and Manning and Watson, att'ys for defendant, of Holly Springs, Miss.

4 *Writ of Error Bond.*

Know all men by these presents, that we, J. Addison Hayes and

W. M. Sneed, are held and firmly bound unto the mayor and aldermen of the city of Holly Springs in the sum of two hundred and fifty dollars, to be paid to the said mayor and aldermen and their successors, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 11th day of March, 1882.

Whereas, the above-named J. Addison Hayes hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the district court of the United States for the northern district of Mississippi;

Now, therefore, the condition of this obligation is such, that if the above-named J. Addison Hayes shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

J. ADDISON HAYES. [SEAL.]
W. M. SNEED. [SEAL.]

Acknowledged before me, this 11th day of M'ch, 1882.

BELL W. ETHERIDGE,
U. S. Circuit Court Commissioner, Western Dist. of Tennessee.

UNITED STATES OF AMERICA, *Western District of Tennessee:*

5 Personally appeared before me, Bell W. Etheridge, one of the commissioners of the circuit and district courts of the United States for the western district of Tennessee, W. M. Sneed, one of the sureties on the within bond, who being by me first duly sworn makes oath and says, that he is a resident of the district of West Tennessee, and is worth the sum of ten thousand dollars in unencumbered real estate in his own name and rights over and above his legal debts and liabilities, and subject to execution under the laws of the State of Tennessee; that said property is situated in Memphis, the county of Shelby, and State of Tennessee, and described as follows.

W. M. SNEED.

Subscribed and sworn to before me, this 11th day of M'ch, A. D. 1882.

BELL W. ETHERIDGE,
United States Commissioner for the Western District of Tennessee.

I approve the foregoing bond and surety.

R. A. HILL, *Judge.*

Filed the 15th day of March A. D. 1882.

G. R. HILL, *Clerk.*

And thereupon, the following citation was issued by the judge, to wit:

Citation.

6 UNITED STATES OF AMERICA.

To the Mayor and Aldermen of the City of Holly Springs, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, 1882, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Mississippi, wherein J. Addison Hayes is plaintiff, and you are defendant in error, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable R. A. Hill, judge of the district court of the United States for the northern district of Mississippi, this 13th day of March, 1882.

[SEAL.] R. A. HILL, *Judge.*

Executed March 22d, 1882, by handing to J. W. Fant, mayor of the town of Holly Springs, personally, a true copy of this writ.

J. L. MORPHIS,
U. S. Marshal.
By B. W. MORPHIS,
Deputy Marshal.

Marshal's fees:

Service	2 00
Mileage, 30 x 6	1 80
	$3 80
Copy	50
	$4 30

7 [Endorsed:] No. 3538. District court of the United States, northern district of Mississippi. Citation. J. Addison Hayes *vs.* Mayor & Aldermen of city of Holly Springs. Filed the day of , A. D. 187 . clerk. D. C.

8 *Declaration.*

UNITED STATES OF AMERICA, *Northern District of Mississippi.*

In the district court for said district, December term, 1881.

J. Addison Hayes, a citizen of the State of Tennessee, by attorney, complains of The Mayor and Board of Aldermen of the City of Holly Springs, a municipal corporation created by the legislature of the State of Mississippi, and located and resident in the county of Marshall, in the northern district of said State, of a plea of debt, &c.

And the said plaintiff avers that in and by an act of the legislature of the State of Mississippi, approved November 19, 1857, entitled "An act to amend the several acts heretofore passed by the

legislature incorporating the town of Holly Springs, in Marshall county," being the above-named defendant, it was and is, among other things, provided, that the said mayor & aldermen "may do and perform all other acts as natural persons, or which may be incident to town or city corporations."

And said plaintiff avers that in and by the constitution of said State of Mississippi, adopted in the year 1868 and still in force, it was and is provided, in article 12, section 14, as follows, to wit: "The legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election or regular election to be held therein, shall assent thereto."

9 And plaintiff avers that in the fall of the year 1871 the inhabitants of the said city of Holly Springs were desirous that said city should subscribe for stock in the Selma, Marion and Memphis Railroad Company, whose road was to be constructed through or near the said city, and that the said mayor and aldermen, in conformity to the wishes of the said inhabitants, on the day of , A. D. 1871, at the district aforesaid, ordered a special election to be held, in pursuance of the said consideration, on the 30th day of December, 1871, to ascertain whether two thirds of the qualified voters of said city would assent to a subscription by said city to seventy-five thousand dollars of the capital stock of said railroad company, and to issue the bonds of said city in payment of said subscription, having to run to the 1st day of January, A. D. 1887, and bearing interest at eight per cent. per annum, payable semi-annually.

And plaintiff avers that due notice was given of said election, and that the same was held on the said 30 day of December, 1871, under the direction and supervision of said mayor & aldermen, and that at said election largely more than two thirds of all the qualified voters of the said city voted in favor of the said subscription and issuance of bonds, and did assent thereto and did thereby authorize and direct the said Mayor and Aldermen to make the said subscription, and to issue and deliver the said bonds.

And plaintiff avers that in and by an act of the legislature of the State of Mississippi, approved March 16, 1872, and taking effect from and after its passage, entitled "an act to facilitate the construction of the Selma, Marion and Memphis railroad," it was among other things provided "that all subscriptions to the capital

10 stock of the Selma, Marion and Memphis Railroad Company made by any county, city, or town in this State, which were not made in violation of the constitution of this State, are hereby legalized, ratified, and confirmed."

And plaintiff avers that by another act of the legislature of the State of Mississippi, entitled "an act to authorize counties, cities, and towns to subscribe to the capital stock of railroads," approved April 19, 1872, it was and is provided "that any county through which any railroad will pass, incorporated city or town along the line of any railroad, or contiguous thereto may subscribe to the capital stock of said company in any sum;" but "that no subscrip-

tion shall be made until the question has been submitted to the legal voters of such county or counties, city or cities, incorporated town or towns, in which the subscription is proposed to be made;" and said last named act further provides "that in case two thirds of the legal voters of such county, city, or town have voted for subscription, the subscription shall be made, and bonds having not more than twenty years to run to maturity, issued to the company therefor."

And plaintiff avers that after the said election, to wit, on the first day of January A. D. 1872, at the district aforesaid, the said defendants, in pursuance of said vote, did subscribe for seventy-five thousand dollars of the capital stock of the said Selma, Marion and Memphis Railroad Company, and agreed and undertook to issue their bonds in payment thereof as soon as the same could be prepaired, and received the regular and proper certificates therefor,
11 which they still hold, and have never surrendered or offered to surrender.

And afterwards, to wit, on the 26th day of April A. D. 1872, the said defendants, in payment of said subscription, made, executed, and delivered to said railroad company their coupon bonds, under their corporate seal, to the amount of seventy-five thousand dollars, of the denominations of $250, $500, and $1,000, all bearing date the first day of January, A. D. 1872, and payable the first day of January, A. D. 1887, with interest at the rate of eight per cent. per annum, payable semi-annually. The said bonds were all in the form following, to wit:

State of Mississippi, City of Holly Springs. Bond. Issued in payment of stock of the Selma, Marion, & Memphis Railroad Co. No. ——, $——. Fifteen years.

Know all men by these presents, that the city of Holly Springs, Marshall county, in the State of Mississippi, acknowledges itself indebted and firmly bound to the Selma, Marion, and Memphis Railroad Company, in the sum of ——— dollars, which sum the city of Holly Springs promises to pay to the Salem, Marion, and Memphis Railroad Company, or bearer, at the Holly Springs Savings & Insurance Company, Holly Springs, Mississippi, on the first day of January, A. D. one thousand eight hundred and eighty-seven, together with the interest thereon from the first day of January A. D. one thousand eight hundred and seventy-two, at the rate of eight per cent. per annum, which interest shall be payable semi-annually, on the presentation and delivery of the attached interest
12 coupons, at the office of the said Holly Springs Saving and Insurance Company.

This bond is issued under and in pursuance to an order of the Board of Mayor and Aldermen of the City of Holly Springs, Marshall county, State of Mississippi, made under authority of the constitution of the State of Mississippi and the laws of the legislature of the State of Mississippi, and authorized by a vote of the people of the said city of Holly Springs, at a special election held for the purpose.

[Corporate seal.] In testimony whereof, the said city of Holly Springs has executed this bond by the mayor of said city, under the order of said city's board of mayor and aldermen, signing his name thereto, and by the treasurer of said city, under the order thereof, attesting the same, and affixing thereto the said seal of the said city of Holly Springs.

This done at the city of Holly Springs, Marshall county, State of Mississippi, this first day of January A. D. 1872.

HENRY A. COOPER,
Mayor of the city of Holly Springs.

LEWIS BEEHLER,
Treasurer of the city of Holly Springs.

Some of the said bonds were of the denomination of two hundred and fifty dollars, some of the denomination of five hundred dollars, and the residue of the denomination of one thousand dollars.

And plaintiff avers that coupons for the semi-annual interest, at the rate of eight per centum from the time of the issuance and delivery thereof to the time of maturity, were attached to each and every one of said bonds, being printed on the same sheet of
13 paper. Those attached to the bonds of the denomination of $250 were for the sum of ten dollars each, payable on the first days of January and July in each year; those attached to the bonds of the denomination of $500 were for twenty dollars each, payable in like manner; and those attached to the bonds of the denomination of $1,000 were for forty dollars each, payable in like manner. The following is the form of the said coupons, omitting the amount, time of maturity, and number of the bond, to wit:

CITY OF HOLLY SPRINGS,
MARSHALL COUNTY, MISSISSIPPI.
January 1st, 1872.

$—— The city of Holly Springs acknowledges to owe the sum of dollars, payable to bearer on the first day of 18 , at the office of the Holly Springs Saving and Insurance Company, Holly Springs, Mississippi, for six months' interest on bond, No. (No. of bond.)

LEWIS BEEHLER,
Treasurer of the city of Holly Springs.

And said plaintiff avers, that after the issuance and delivery of the said bonds to the said railroad company, as aforesaid, the said defendant for several years continued to levy and collect taxes for the payment of the interest accruing on said bonds, and did pay off and take up said coupons as the same fell due, and during the same period voted the stock subscribed as aforesaid in the election of directors of said railroad company, and in all stockholders' meetings of said company.

And the plaintiff avers that afterwards, to wit, on the first day of January, 1875, at the district aforesaid, he became the *bona fide* holder for value in due course of trade, and without any no-
14 tice or knowledge of any alleged illegality in said bonds, or want of power to issue the same, of the following bonds issued

to the said Selma, Marion and Memphis Railroad Company, as aforesaid, to wit:

31 bonds of the denomination of $250, numbered as follows: Nos. 22, 23, 24, 25, 26, 27, 28, 29, 30, 86, 87, 88, 89, 90, 91, 94, 95, 96, 104, 108, 109, 113, 114, 117, 118, 120, 121, 122, 136, 137, and 138.

Seven bonds of the denomination of $500, numbered as follows: Nos. 37, 38, 39, 40, 83, 84, & 85.

Five bonds of the denomination of $1,000, numbered as follows: Nos. 1, 2, 16, 32, 33.

And plaintiff avers that he is the owner and holder, as aforesaid, of 568 coupons of semi-annual interest on said bonds, which coupons bear interest from their maturity and are of the denominations, and due at the times hereafter specified, to wit:

Coupons of the denomination of $10, each.

26 coupons, due Jan. 1, 1875	$260 00
26 coupons, due July 1, 1875	260 00
30 coupons, due Jan. 1, 1876	300 00
30 coupons, due July 1, 1876	300 00
30 coupons, due Jan. 1, 1877	300 00
30 coupons, due July 1, 1877	300 00
30 coupons, due Jan. 1, 1878	300 00
30 coupons, due July 1, 1878	300 00
30 coupons, due Jan. 1, 1879	300 00
30 coupons, due July 1, 1879	300 00
30 coupons, due Jan. 1, 1880	300 00
30 coupons, due July 1, 1880	300 00
30 coupons, due Jan. 1, 1881	300 00
30 coupons, due July 1, 1881	300 00

15 Coupons of the denomination of $20, each:

3 coupons, due Jan'y 1, 1875	$60 00
3 coupons, due July 1, 1875	60 00
7 coupons, due Jan. 1, 1876	140 00
7 coupons, due July 1, 1876	140 00
7 coupons, due Jan. 1, 1877	140 00
7 coupons, due July 1, 1877	140 00
7 coupons, due Jan. 1, 1878	140 00
7 coupons, due July 1, 1878	140 00
7 coupons, due Jan. 1, 1879	140 00
7 coupons, due July 1, 1879	140 00
7 coupons, due Jan. 1, 1880	140 00
7 coupons, due July 1, 1880	140 00
7 coupons, due Jan. 1, 1881	140 00
7 coupons, due July 1, 1881	140 00

Coupons of the denomination of $40, each:

4 coupons, due Jan. 1, 1875	160 00
4 coupons, due July 1, 1875	160 00
4 coupons, due Jan. 1, 1876	160 00
4 coupons, due July 1, 1876	160 00

5 coupons, due Jan. 1, 1877	200 00
5 coupons, due July 1, 1877	200 00
5 coupons, due Jan. 1, 1878	200 00
5 coupons, due July 1, 1878	200 00
5 coupons, due Jan. 1, 1879	200 00
5 coupons, due July 1, 1879	200 00
5 coupons, due Jan. 1, 1880	200 00
5 coupons, due July 1, 1880	200 00
5 coupons, due Jan. 1, 1881	200 00
5 coupons, due July 1, 1881	200 00

And the plaintiff further avers that by means of the premises an action hath accrued to him to demand and have of and from the said defendants the amount of the said coupons and interest thereon, to wit, the sum of fifteen thousand dollars. Yet the defendants, although often requested, have not paid the said sum above demanded or any part thereof, but to pay the same have always refused and still refuse to the damage of the said plaintiff of fifteen thousand dollars, and therefor he sues.

16

ESTIS AND ELLETT,
Att'ys for Pl'ff.

Filed & summon issued Nov. 28, 1881.

G. P. HILL, *Clerk.*

And, to wit, on the same day a summon was sued out in said cause, which is in the words and figures following, to wit:

The President of the United States to the marshal of the northern district of Mississippi, Greeting:

We command you, without delay, to summon the mayor and aldermen of the city of Holly Springs, a municipal corporation, created by the legislature of the State of Mississippi and citizens of the State of Mississippi residing in the northern district thereof, that they be and appear before the district court of the United States, to be held in the town of Oxford, for the said northern district of Mississippi, on the first Monday of December next, to answer the complaint of J. Addison Hay-s, a citizen of the State of Tenn., and that they do file their plea or defence with the clerk of said court on or before the meeting of the same, or judgment will be given against them by default, and have then there this writ.

17

Witness the Honorable R. A. Hill, judge of the district court of the United States for the northern district of Mississippi, at Oxford, the first Monday of June A. D. 1881, and 105 year of the Independence of the United States.

Issued the 28 day of Nov., 1881. G. R. HILL, *Clerk.*

UNITED STATES OF AMERICA, *Northern District of Mississippi:*

This action is brought to recover on bonds & coupons of the city of Holly Springs, issued in aid of Selma, Marion and Memphis R. R. Co., now held by said plaintiff claiming to have been damaged; $15,000 is the demand.

G. R. HILL, *Clerk.*

The following is the return of the marshal as endorsed on the foregoing writ, to wit:

Executed Nov. 30, 1881, by handing to J. W. Fant, mayor of the town of Holly Springs, and president of the board of mayor and aldermen thereof, a true copy of the within writ.

J. L. MORPHIS, *U. S. Marshal.*
By J. C. MORPHIS, *Deputy Marshal.*

Marshal's costs:

Service	2 00
1 copy, 50 c.; Cit. R., 50 c.	1 00
Actual expenses in lieu of mileage	3 30
	$6 30

And afterwards, to wit, on the 6th day of December, the same being a day of the December term of said court A. D. 1881, and order was made in said case, which is in the words & figures following, to wit:

18 J. ADDISON HAYES
vs.
MAYOR & ALDERMEN OF HOLLY SPRINGS. } 3538.

Upon application of the defendants, leave of thirty days, as of this term, is hereby granted within which to plead, &c.

And afterwards, to wit, on the 6th day of March, 1882, a demurrer was interposed by the defendants to the foregoing declaration and filed, which is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA.

District Court of the United States for the Northern District of Mississippi. December Term, 1881.

J. ADDISON HAYES, Plaintiff,
vs.
THE MAYOR & ALDERMEN OF THE CITY OF HOLLY SPRINGS, Defendant.

And the said defendant, by attorney, comes and defends the wrong & injury when, &c., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same, and this it is ready to verify; wherefore, by reason of the insufficiency of the declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from
19 having and maintaining his aforesaid action thereof against it. And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court the following causes of demurrer to said declaration.

1st. The declaration does not aver nor show that the defendant had any power or authority to subscribe for the said sum of

seventy-five thousand dollars, or any other sum, of the capital stock of said Selma, Marion and Memphis Railroad Company.

2nd. Said declaration does not aver nor show that the defendant had any power or authority to issue the bonds and coupons therein described in payment of any subscription to the capital stock in said railroad company, or for any other purpose.

3d. That said declaration does not aver nor show that the defendant had any power or authority to hold the election required by the constitution of the State of Mississippi to ascertain whether the legal voters of said corporation would assent to the alleged subscription to the capital stock of said railroad company.

4th. Because said declaration does not show that the mayor and aldermen of said city had any power or authority on the day of , 1871, to order that an election be held on the 30th day of December, 1871, to ascertain whether two-thirds of the qualified voters of said city would assent to a subscription by said city for seventy-five thousand dollars to the capital stock of said railroad company, and to issue the bonds of said city for the payment of said subscription, as alleged in said declaration.

5th. Said declaration does not aver or show that said alleged election of December 30th, 1871, was held under any lawful authority or that it was a valid legal election.

6th. And because the said declaration is in other respects informal, uncertain, and insufficient.

FEATHERSTON AND HARRIS,
MANNING AND WATSON,
Attorneys for the Defendant.

Filed March 6th, 1882.

G. R. HILL, *Clerk.*

And thereafter, to wit, on the 7th day of March, A. D. 1882, the same being a day of the adjourned term of the December term of said court A. D. 1881, the following order and judgment was had in said cause, to wit:

J. ADDISON HAYES
vs. } 3538.
MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS.

This cause came on for argument on the demurrer of the defendant to the declaration of the plaintiff, and on consideration thereof, the court being of opinion that the said declaration is not sufficient in law for the plaintiff to have or maintain his said action against the said defendant, therefore said demurrer to said declaration is sustained. And the plaintiff not asking to amend his said declaration:

It is therefore considered that the plaintiff take nothing by his said writ, and that the defendant go hence without day, and that the defendant recover of the plaintiff the costs of this cause to be taxed, for which let execution issue.

21 UNITED STATES OF AMERICA, } ss:
Northern District of Mississippi, }

I, George R. Hill, clerk of the district court of the United States for the northern district of Mississippi, do hereby certify that the foregoing pages contain a true & perfect transcript of the declaration, writ, demurrer, and all orders and judgments in the case of J. Addison Hays against The Mayor & Aldermen of the City of Holly Springs, as fully as the same appears of record and on the files in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at my office, in Oxford, in said district, on this the 3d day of April, A. D. 1882.

[SEAL.] G. R. HILL, *Clerk.*

Bill of Cost.

Clerk's fees	32 10
Attorney's fee	10 00
Marshal's fees	10 60
Total	$52 70

22 *Decision rendered by Judge R. A. Hill, in the case of Selma, Marion & Memphis Railroad against the City of Holly Springs.*

In the District Court of the United States for the Northern District of Mississippi. Special March Term, 1882.

J. ADDISON HAYES *vs.* MAYOR AND ALDERMEN OF HOLLY SPRINGS.

Municipal corporations, such as cities and towns being creatures of the legislature, can only exercise such powers as the legislature, the creator, confers upon them, and the legislature being the creature of the constitution, can confer no power upon such corporation which is forbidden by the constitution.

To render a subscription by a city or town to the capital stock of a railroad company valid in the State of Mississippi, there must be authority conferred by an act of the legislature upon such corporation to make such subscription, and this can only be done under the restriction imposed by the constitution after two thirds of all the qualified voters within such corporation shall have voted therefor at a special or general election held therein for such purpose and which election shall have been authorized by law.

To render valid, bonds or other securities given in payment for such subscription and issued by such corporation, there must be authority, expressed or implied, conferred by law upon the corporation to issue such securities. The purchaser of such securities takes the risk of the legislative authority required.

When the necessary legislative authority is given, and the security upon its face recites the authority under which the same is issued and a compliance with the requirements of the law, the corporation will be estopped from disputing their validity as against a bona fide purchaser for value.

A subscription made by the mayor and aldermen of a town to

capital stock in a railroad company, without the consent of a majority of two-thirds of the qualified voters at an election authorized by law, cannot be ratified and validated by subsequent legislation.

The mayor and aldermen being only agents of the inhabitants of the city or town, cannot, by any act of theirs make valid their own unauthorized acts.

H. T. Ellett, for plaintiff.

W. S. Featherstone and E. M. Watson, for defendants.

Hill, district judge.

This is an action of debt, brought by the plaintiff against the defendants to recover the amount due upon the coupons described in the declaration as interest on certain bonds issued by the defendants to the Selma, Marion & Memphis Railroad Company, in payment for capital stock subscribed by the defendants, in said railroad company, which bonds bear date the first day of January 1872. The declaration alleges that by an act of the legislature of the State of Mississippi, approved the 19th day of November, 1857, entitled "An Act to amend the several acts heretofore passed by the legislature incorporating the town of Holly Springs in Marshall county," (being the defendant) it was and is, among other things provided that the said mayor and aldermen may do and perform all other acts as natural persons, or which may be incident to a town or city corporation. That in and by the constitution of the State of Mississippi, adopted in the year 1869 and still in force, it is provided in article 12, section 14, that the legislature shall not authorize any county, city or town to become a stockholder or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election to be held therein, shall assent thereto.

That in the fall of the year 1871, the inhabitants of the city of Holly Springs were desirous to subscribe stock in the Selma, Marion & Memphis Railroad Company, whose road was to be constructed through or near said city, and that said mayor and aldermen in conformity to the wishes of said inhabitants on the —— day of ——— 1871, ordered a special election to be held in pursuance to the provisions of said constitution, on the 30th day of December, 1871, to ascertain whether or not two-thirds of the qualified voters of said city would assent to a subscription by said city, for seventy-five thousand dollars of capital stock in said railroad company, and to issue the bonds of said city in payment of said subscription, having to run to the first day of January, 1887, and bearing at 8 per cent. per annum, payable semi-annually. That due notice was given of said election, that the same was held on the said 30th day of December, 1871, under the direction and supervision of said mayor and aldermen, and that at said election, largely more than two-thirds of all the qualified voters of said city voted in favor of said subscription and issuance of said bonds, and did assent thereto, and did thereby authorize and direct the said mayor and aldermen to make the said subscription, and to issue and deliver the said bonds.

That by an act of the legislature approved March 16th, 1872, and taking effect from its passage, entitled, "An act to facilitate the construction of the Selma, Marion & Memphis railroad, it was, among other things provided "that all subscriptions to the capital stock of the Selma, Marion & Memphis Railroad Company, made by any county, city or town in this State which was not made in violation of the constitution of the State, are hereby legalized, ratified and confirmed." That by an act of the legislature of this State entitled, "An act to authorize counties, cities and towns to subscribe to the capital stock of railroads," approved April 19th, 1872, it was and is provided "that any county through which any railroad will pass or city or town along the line of any railroad, or contiguous thereto, may subscribe to the capital stock of said company in any sum," but that no such subscription shall be made until the question has been submitted to the legal voters of such counties, cities or towns in which the subscription is proposed to be made, and further, that in case any such county, city or town in which two-thirds of the qualified voters have voted for subscription, the subscription shall be made, and bonds having not more than twenty years to run to maturity, shall be issued to the company therefor.

That after said election, to wit: on the 1st day of January, 1872, the defendants did subscribe for seventy-five thousand dollars of capital stock in said Selma, Marion & Memphis Railroad Company and agreed and undertook to issue its bonds in payment thereof, as soon as the same could be prepared, and that the defendants received the proper and regular certificates for said capital stock, which the defendants still hold and have never surrended, or offered to surrender, and afterwards, on the 26th day of April, 1872, the defendants, in payment for their subscription, made and executed their coupon bonds, under their corporate seal, to the amount of seventy-five thousand dollars, bearing date the 1st day of January, 1872, and payable first day of January, 1887, with interest at the rate of 8 per cent. per annum payable semi-annually.

The bonds and interest coupons, set out in the declaration, are all in the usual form of such bonds and coupons, and recite upon their face the purpose for which they were issued, and that they were issued in pursuance to an order of the board of mayor and aldermen of the city of Holly Springs, made under the authority of the constitution of the State of Mississippi and the laws passed by the legislature of said State. The declaration further avers, that before that time, the said mayor and aldermen had levied and caused to be collected taxes from the taxable property within said city of Holly Springs, and had paid the interest coupons due thereon, and had been represented in the meetings of the stockholders of said railroad company.

To the declaration the defendants interpose their demurrer.

Stating various grounds for the same, the substance of which is, that said subscription was made, and said bonds and coupons were issued without any authority of law, and are therefore null and void. Whether such is the case or not, is the question for decision. Municipal corporations such as cities and towns, being creatures of the

legislature, can only exercise such powers as the legislature, their creator, confers upon them. The legislature being the creature of the constitution, can confer no power upon such corporation which is forbidden by the constitution.

If there is anything settled by the Supreme Court of the United States, and followed by the supreme court of this State, in unbroken adjudications from the case of Aspinwall *vs.* Knox county, 24 How., 247, to the last published decision of Allen *vs.* Louisiana, 13 Otto, 80, by the Supreme Court of the United States, and by the supreme court of this State in the cases of Sykes *vs.* City of Columbus, 55 Miss., 115, and Woodruff *vs.* Okolona, 57 Miss., 806, it is, that to render a subscription for capital stock in a railroad company, by a city or town valid, there must be authority conferred by the legislature upon such corporation to make such subscription.

It is equally well settled by the same authorities, that bonds or other securities given in payment for such subscriptions, issued by such corporations, to be valid must by either express authority, or by necessary implication, be authorized by law; that the purchaser of such securities takes the risk of the necessary legislative authority to make the subscription and issue the securities.

It is also well settled both by the Supreme Court of the United States, and of this State, that when bonds are authorized and recite upon their face, that they are issued in pursuance of the authority given, the corporation will be estopped from disputing the fact, as against a bona fide holder for value without notice.

The next point of inquiry is to ascertain whether the allegations in the declaration show the necessary authority for the subscription to the capital stock in the Selma, Marion and Memphis Railroad Company, and the insurance of the bonds with the interest coupons set out in the declaration.

It is suggested, rather than seriously argued, by the learned counsel for plaintiff, that the power stated in the act incorporating the mayor and aldermen of the city of Holly Springs to act as a natural person, confers such authority. When this language is considered in connection with the section prescribing the powers of the corporation it must be held as mere surplusage; and if it were otherwise the inhibition of the constitution would have annulled it.

No authority is averred or claimed for the holding of the election, subscription for stock, or the issuance of the bonds at the time the election was held, the subscription was made, or when the bonds were signed and dated; but it is insisted that by the acts of the legislature approved March 16th and April 19th, 1872, recited in the declaration, the election, subscription, and issuance of the bonds and coupons, were ratified, confirmed and made valid. That such would have been the case but for the inhibitory clause, in the constitution referred to, may be conceded. It is, however, insisted by plaintiff's counsel, that this inhibitory clause in the constitution, confers the power. It may be conceded that a prohibitory clause in a constitution may be self-executing, without legislative action, but I am not referred to any case in which such prohibition has been held to confer power, and it is difficult to perceive upon what principle it can

be done. I am satisfied that the framers of the constitution contemplated that the election held to ascertain the will of the electors in relation to the subscription for capital stock in the railroad companies, should be authorized by the legislature before held, and that it should be such as would render the officers holding it, and the voters liable to prosecution for any violations of law in relation thereto. The acts of the legislation relied upon as ratifying and confirming the acts of the mayor and aldermen, contemplated such an election, and no other, and had they done otherwise would have been invalid. This view is sustained by the Supreme Court of the United States in the case of Allen *vs.* Louisiana, 103 U. S., p. 80, and by the supreme court of this State in the case of Sykes *vs.* Columbus, 55 Miss., 115; and Woodruff *vs.* Okolona, 57 Miss., 806. I am compelled to the conclusion that the legislature by these acts did not ratify or intend to ratify the acts of the mayor and aldermen in holding the election, making the subscription for the capital stock, and issuing the bonds and coupons averred in the declaration.

It is admitted by plaintiff's counsel that if the acts of the mayor and aldermen were invalid, they could not by any act of theirs validate them.

I am satisfied that the bonds and coupons described in the declaration are for the reasons stated, entirely void in the hands of all parties, and that the demurrer must be sustained.

I, G. R. Hill, clerk of the district court of the United States for the northern district of Mississippi, do hereby certify that the foregoing is a true and complete copy of the original opinion in said case, as the same appears on the files in said court.

Witness my hand and the seal of said court, at Oxford, Miss., this the 3d day of April, 1882.

[SEAL.] G. R. HILL, *Clerk.*

Endorsed on cover: N. Mississippi. D. C. U. S. No. 200. J. Addison Hayes, plaintiff in error, *vs.* The Mayor and Aldermen of the city of Holly Springs. Filed 29th April, 1882.

DEC 26 1884

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

J. ADDISON HAYES,
Plaintiff in Error,

No. 200. vs.

MAYOR AND ALDERMEN
of the City of Holly Springs,
Defendants in Error,

In error to the District Court for the Northern District of Mississippi.

BRIEF OF H. T. ELLETT, COUNSEL FOR PLAINTIFF IN ERROR.

TRACY & CO., PRINT., 299 MAIN ST., MEMPHIS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

J. ADDISON HAYES,
Plaintiff in Error,

No. 200. vs.

MAYOR AND ALDERMEN
of the City of Holly Springs,
Defendants in Error,

In error to the District Court for the Northern District of Mississippi.

BRIEF OF H. T. ELLETT, COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This cause was decided in favor of the defendants in the court below, on demurrer to the declaration, and the plaintiff brings the case to this court by writ of error.

The declaration avers that in and by the constitution of Mississippi, adopted in 1868, and still in force, it was and is provided, in Article 12, Section 14, as follows, to-wit: "The legislature shall not authorize any county, city or town, to become a stockholder in, or to lend its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto."

That in the fall of the year 1871, the inhabitants of the said city of Holly Springs were desirous that said city should subscribe for stock in the Selma, Marion and Memphis Railroad Company, whose road was to be constructed through or near the said city; and that the said Mayor and Aldermen, in conformity to the wishes of the said inhabitants, on the ——— day of ———, 1871, ordered a special election to be held, in pursuance of the said constitution, on the 30th day of December, 1871, to ascertain whether two-thirds of the qualified voters of said city would assent to a subscription by said city to seventy-five thou-

sand dollars of the capital stock of said railroad company, and to issue the bonds of said city in payment of said subscription, having to run to the 1st day of January, 1887, and bearing interest at eight per cent. per annum, payable semi-annually.

That due notice was given of the said election, and that the same was held on the said 30th day of December, 1871, under the direction and supervision of said Mayor and Aldermen, and that at said election largely more than two-thirds of all the qualified voters of the said city voted in favor of the said subscription and issuance of bonds, and did assent thereto, and did thereby authorize and direct the said Mayor and Aldermen to make the said subscription and to issue and deliver the said bonds.

That in and by an act of the Legislature of the State of Mississippi, approved March 16, 1872, and taking effect from and after its passage, entitled "An Act to facilitate the construction of the Selma, Marion and Memphis railroad," it was, among other things, provided that "all subscriptions to the capital stock of the Selma, Marion and Memphis Railroad Company, made by any county, city or town, in this State, which were not made in violation of the constitution of this State, are hereby legalized, ratified and confirmed."

That after said election, to-wit, on the first day of January, 1872, the said defendants, in pursuance of said vote, did subscribe for $75,000 of the capital stock of the said Selma, Marion and Memphis Railroad Company, and agreed and undertook to issue their bonds in payment thereof as soon as the same could be prepared, and received the regular and proper certificates therefor, which they still hold, and have never surrendered nor offered to surrender.

That afterwards, to-wit, on the twenty-sixth day of April, 1872, the said defendants, in payment of said subscription, made, executed and delivered to said railroad company, their coupon bonds, under their corporate seal, to the amount of $75,000, of the denominations of $250, $500, and $1,000, all bearing date the first day of January, 1872, and payable the first day of January, 1887, with interest at the rate of eight per cent per annum, payable semi-annually. The said bonds are all in the form following, to-wit: (The declaration sets out the bonds in the

usual form of such securities, each bond containing the following recital: "This bond is issued under and in pursuance to an order of the Board of Mayor and Aldermen of the City of Holly Springs, Marshall county, State of Mississippi, made under authority of the constitution of the State of Mississippi, and the laws of the Legislature of the State of Mississippi, and authorized by a vote of the people of the said City of Holly Springs, at a special election held for the purpose.")

The declaration then alleges that coupons for the semi-annual interest at the rate of eight per cent. from the time of the issuance and delivery thereof to the time of maturity, were attached to each and every one of said bonds, being printed on the same sheet of paper. Those attached to the bonds of the denomination of $250 were for the sum of $10 each, payable on the first days of January and July in each year; those attached to the bonds for $500 were for $20 each, payable in like manner; and those attached to the bonds for $1,000 were for $40 each, payable in like manner. The form of said coupons is set out in full.

That after the issuance and delivery of the said bonds to the railroad company as aforesaid, the said defendants, for several years, continued to levy and collect taxes for the payment of the interest accruing on said bonds, and did pay off and take up said coupons as the same fell due, and during the same period voted the stock subscribed as aforesaid in the election of directors of said railroad company, and in all stockholders' meetings of said company.

That on the first day of January, 1875, plaintiff became the *bonafide* holder for value in due course of trade, and without any notice or knowledge of any alleged illegality in said bonds, or want of power to issue the same, of the following bonds issued to the said Selma, Marion and Memphis Railroad Company as aforesaid, to-wit (describing the same).

That plaintiff is the owner and holder as aforesaid of 568 coupons of semi-annual interest on said bonds, which coupons bear interest from their maturity, and are of the denominations, and due at the times hereafter specified, to-wit (describing said coupons).

That by means of the premises an action hath accrued to the plaintiff, to demand and have of and from the defendants the amount of said coupons and interest

thereon, to-wit, the sum of $15,000. Yet the defendants have not paid, but refuse to do so.

Several grounds of demurrer are assigned, to-wit:

1. That the declaration does not show that the defendants had any power or authority to subscribe to the stock.

2. That it does not show any power or authority to issue the bonds and coupons.

3. That it does not show any power or authority to hold the election.

4. That it does not show any power or authority to order the election.

5. That it does not show that the election was held under any lawful authority.

ASSIGNMENT OF ERRORS.

The court below erred in sustaining the demurrer to the declaration, and in giving judgment in favor of the defendants, on such demurrer.

BRIEF.

I.

The first question in this case is, whether the bonds, to which the coupons sued on were attached, are void by reason of the fact that the vote of the people was taken without a special act of the legislature having been previously passed to authorize it.

The Constitution of Mississippi, adopted December 1, 1869, contains the following provision, to-wit: "Art. 12, Sec. 14. The legislature shall not authorize any county, city or town, to become a stockholder in, or to lend its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

The declaration alleges, and the demurrer admits it to be true, that the Mayor and Aldermen of Holly Springs, in conformity to the wishes of the inhabitants, ordered a special election to be held, in order to ascertain whether two-thirds of the qualified voters would assent to the subscription of stock, and the issuance of the bonds in ques-

tion; that said election was regularly held, after due notice, on the 30th of December, 1871, and that largely more than two-thirds of all the qualified voters of the said city voted in said election in favor of the said subscription, and of the issuance of said bonds. It is also averred, and in like manner admitted, that on January 1, 1872, the defendants, in pursuance of said vote, made the subscription of stock, and agreed and undertook to issue the bonds as soon as they could be prepared, and that they then received the regular and proper stock certificates, which they still hold and have never surrendered, nor offered to surrender.

That under the constitution, a special election may be held for the sole purpose of passing on such propositions, is settled in Cutler vs. Supervisors, 56 Miss., 124.

But it is insisted, on behalf of the defendants, that such an election cannot be held without a previous special act of the legislature authorizing it to be held.

On the contrary, we maintain that the constitution of the State contemplates that the vote of the people shall be taken, or at least may be taken, in advance of the application to the legislature for authority to make the subscription. Such is the plain, obvious and natural import of the language.

The Section is a limitation of the power of the legislature. It might be argued that the assent of the qualified voters is made a condition precedent to the passage of any law to authorize a county, city or town, to become a stockholder in any private enterprise. It is sufficient however, for our purpose, that such assent must be expressed before the authority to subscribe can come into existence. Conceding the validity of a law providing for a subscription on condition of a subsequent assent by the qualified voters, it is quite as plain that a subscription may be authorized in pursuance of an election previously held, and the proper assent previously expressed.

It required no special legislation to enable the city authorities to hold the election in this case. All the necessary machinery to order, hold and supervise the election, and to ascertain and declare the result, was provided, and the qualification of voters prescribed, by the charter of the city. (Appendix to this Brief, I. & II.) The general laws of the State provided ample punishment for fraud and illegality in conducting it. (Code of Miss. 1871, Sections

2536-2546.) These provisions are broad enough to embrace all municipal elections; but, if not, they are the only safeguards the wisdom of the legislature has considered necessary to insure their purity and fairness.

The argument for convenience is all in favor of our position. The constitution was not designed to put the State to the expense of passing and publishing mere tentative or experimental bills, that might result in nothing. Public policy manifestly would demand that municipalities desiring to make such subscriptions, and to issue bonds in payment, should first ascertain the sentiments of their people by a proper vote, and make the same known to the legislative body in some authentic form.

This view is fully sustained by the Supreme Court of Georgia, in Danielly vs. Cabaniss, 52 Georgia, 223. The constitution of Georgia contains the following provision:

"Art. 3, Sec. 6-4. No law shall be passed by which a citizen shall be compelled against his consent, directly or indirectly, to become a stockholder in, or contribute to, any railroad or work of public improvement, except in the case of the inhabitants of a corporate town or city. In such cases the General Assembly may permit the corporate authorities to take such stock, or make such contribution, or engage in such work, after a majority of the qualified voters of such town or city, voting at an election held for the purpose, shall have voted in favor of the same; but not otherwise."

In the case cited the vote was taken without being authorized by a previous act of the legislature, and the Court say: "There is nothing in the constitution prescribing the time of the assent of the people to an act of the legislature, authorizing the corporation to engage in a public work. The language is just as applicable, perhaps more so, to the idea that the vote is to be taken before the act, as the contrary; and there seems to be no reason why either way does not conform to the constitutional provisions. The main idea is to know that the enterprise is approved by the people, by a formal election held under proper rules. In the case of a town or city, where there is a perfect machinery for the purpose, there is just as much, perhaps more, propriety in coming to the legislature with the will of the people already ascertained, as to get the act, and then learn if the object be approved by the people."

An authority could hardly be more completely in point.

Stress was laid in the argument in the court below on the words "to be held," which, it was contended, indicated that the vote must be taken after the passage of a law specially providing for it. But such is not their import. As this clause of the constitution first created the necessity for any such election, the words relate only to elections "to be held" after the adoption of the constitution, and not after the passage of the law authorizing the subscription.

If the language of the constitution is ambiguous, and its meaning uncertain, the people of Holly Springs placed upon it what they believed, and no doubt were advised, was its proper construction. They acted upon their interpretation of it, held their election, gave their votes, and made their subscription accordingly. The city received their stock certificates, which they still hold and have never offered to surrender, and which for several years they voted as stockholders in the elections for directors, and in all stockholders' meetings. For several years they levied taxes and paid the interest coupons as they fell due. And when they issued their bonds, they certified on their face that they were issued "*under the authority of the constitution and laws of the State*, and authorized by a vote of the people at a special election held for the purpose."

After all this, the defendants ought not to be permitted to insist upon a different construction of the constitution, not plainly required by the language, for the purpose of enabling them to repudiate their own deliberate engagements. Courts will rather struggle to uphold a construction thus adopted and acted upon, and under which, rights of third persons, innocent holders of these securities, have grown up.

We are, of course, aware that innocent holders cannot be protected, where there is an absolute want of legislative authority to contract the obligation. What we contend for is that, under circumstances such as exist here, the court will not so construe the constitution of Mississippi as to declare the vote taken by the people of Holly Springs to be illegal and void for want of a preceding act

of the legislature authorizing it to be taken, unless imperatively compelled to do so.

That great weight is due to the construction given to the constitution by the defendants, has been recognized by the Supreme Court of Mississippi. In Vicksburg vs. Lombard, 51 Miss. 111, 124, on the question whether the law enabled the city to issue bonds *negotiable* in their character, that court said: "If it were doubtful whether the express power was conferred, after the city authorities have placed the construction upon the law that they had the power, and after the legislature that granted the charter have placed the same construction upon it, the courts should conform to this practical interpretation as settling the doubt." It is, moreover, a maxim that "*contemporanea expositio est fortissima in lege.*"

Suppose that after this vote of the people of Holly Springs, the legislature had passed an act reciting in a preamble that at a special election held for the purpose, under authority of the mayor and aldermen of the city of Holly Springs, on the 30th day of December, 1871, two-thirds of the qualified voters of said city voted in favor of subscribing $75,000 to the capital stock of the Selma, Marion and Memphis Railroad Company, and issuing the bonds of the city in payment of said subscription, and have accordingly petitioned this legislature for authority to make such subscription and to issue such bonds, therefore, "Be it enacted," etc., (giving authority to make the the subscription, and to issue the bonds), surely it could not be seriously denied that bonds issued under such an act would be valid and binding.

It is no answer to say that in fact no such law was passed. That is true; but to fall back on that position would be to concede the construction of the constitution for which we contend. For, if such a law would be valid, it is because such a vote may be taken under the constitution, without the previous enactment of a law authorizing it to be done.

The case of Thompson vs. Lee County, 3 Wall. 331, is directly in point to sustain the validity of such an act as we have here supposed. It is said in that case: "If the legislature possessed the power to authorize the act to be done, it could, by a restrospective act, cure the evils which existed, because the power thus conferred had been irregularly executed."

Here, the legislature unquestionably possessed the power on the 16th of ~~April~~ March, 1872, to authorize the city of Holly Springs to take a vote on the question of subscribing for stock in this railroad company, and issuing bonds to pay for such stock. Having the power to authorize the vote, it had the right to ratify and accept a vote already taken, and to make the same a valid foundation for such subscription. And having power to authorize such subscription and issuance of bonds, on condition of the assent of two-thirds of the qualified voters, it had the right to ratify and make valid a subscription previously made, provided the same was made after the assent of the qualified voters, and therefore not in violation of the constitution.

There is no decision of the Supreme Court of Mississippi settling the construction of this clause of the constitution in respect to cases like the present.

In Hawkins vs. Carroll County, 50 Miss. 735, it was held that the assent of two-thirds of all the qualified voters of the county was required under this section, and that two-thirds of those voting in the election was not sufficient, if less than two-thirds of the whole number. This case has been overruled and disregarded in this court in Carroll County vs. Smith, 111 U. S. 556.

In Vicksburg vs. Lombard, 51 Miss. 111–126, it was held that, where the constituted authorities of the city were vested with power to hold the election, canvass the votes, and declare the result, their decision was conclusive against the city in favor of a bona fide holder, on the question whether the required two-thirds had voted in favor of the issuance of the bonds.

In Sykes vs. Columbus, 55 Miss. 115, the city of Columbus, before the constitution of Mississippi of 1869 took effect, issued bonds, without any legislative authority whatever, in aid of the same railroad company. The bonds recited that they were authorized by a vote of the people of said town held July 24, 1869, but there was no averment that any such election was in fact held, nor, of course, that two-thirds of the qualified voters assented to the issuance of the bonds. It was insisted that these bonds were ratified and made valid by the same act of March 16, 1872. But the court held that inasmuch as the legislature had no power in 1872 to authorize the issuance of the bonds in question, without the assent of two-thirds of the qualified voters, it therefore had no power to ratify and

legalize bonds issued without such assent. See Cutler vs. Supervisors, 56 Miss. 120.

This is in accordance with the settled doctrines of the law on the subject of ratification.

Indeed, the court seems to decide that the act of 1872 only embraces municipal subscriptions and aids to railroad companies made after the adoption of the constitution. And the whole argument of the opinion assumes that the phrase, "which were not made in violation of the constitution of this State," means only, "not made without the assent of two-thirds of the qualified voters, as required by the constitution."

In Cutler vs. The Supervisors, 56 Miss. 115, there was a statute authorizing the county to issue bonds bearing interest payable annually. The county, after the required vote, issued bonds bearing interest payable semi-annually, and the legislature subseqnently ratified and confirmed the action of the county in so doing. These bonds were held to be valid. It is said by the court, in argument: "The Board of Supervisors cannot issue bonds to pay for stock subscription to a railroad company, without the consent of the qualified electors, given as prescribed by the constitution. If that is wanting, a curative or ratifying act of the legislature would impart no validity to the bonds. The essential conditions to the creation of that sort of indebtedness by the county, are: first, legistive authority; and, second, a vote of the qualified electors."

The court do not intend by this expression, to say that there must first be an act of the legislature to authorize a vote of the people to be taken and the subscription to be made, and after that, a vote of the people. All that is meant is to enumerate the things necessary to a valid subscription, without undertaking to prescribe the order of their occurrence. The meaning would have been the same if the court had said, "first, a vote of the qualified electors; and, second, legislative authority to make the subscription."

Woodruff vs. Okolona, 57 Miss. 806, only decides that bonds made payable twenty years after date, issued under an act which provided that they should not extend beyond ten years from the date of issuance, were void for want of authority to issue them, and because holders were bound

to take notice of any want of power to issue the *very* bonds issued. It was also held that in such a case, the town was not estopped by a recital in the bonds that they were issued in pursuance of law.

Aberdeen vs. Sykes, 59 Miss. 236, rules that where a city has power to issue bonds for a particular purpose, and the bonds issued recite that they were issued under that authority, and for that purpose, it is not competent for the city, in an action on the bonds to defend by showing that they were in fact issued for a different and unlawful purpose.

These appear to be all the decisions of the Supreme Court of Mississippi on the subject of municipal bonds, made since the constitution of 1869.

The case of Allen vs. Louisiana, 103 U. S. 80, is not in conflict with the foregoing views.

The constitution of Missouri, like that of Mississippi' prohibited the legislature from authorizing municipal corporations to become stockholders in corporations, without the assent of two-thirds of the qualified voters.

The charter of the city of Louisiana, granted subsequently to the constitution, authorized certain railroad subscriptions to be made with the assent of a *majority* of the *resident tax-payers*.

An election was ordered and held on the proposition to take stock in a certain railroad company, and more than two-thirds of the qualified voters cast their ballots in favor of the subscription.

There was no law authorizing the subscription, or the holding of the election, except the provisions of the charter, requiring a majority of the resident tax-payers. Nor was there any subsequent act purporting to ratify the proceedings.

In reference to the validity of the bonds issued under these circumstances, the court say: "The question which lies at the foundation of this case is whether the legislature of Missouri has, by a valid law, authorized the city of Louisiana to subscribe to the capital stock of the Quincy, Alton and St. Louis Railroad Company, an Illinois corporation."

The bonds recited that they were issued under the authority of the city charter, and the court go on to demonstrate that the charter cannot be construed as being itself a grant of authority to subscribe, because it makes a subscription dependent on a majority vote of the resident tax-payers, while the constitution requires the assent of two-thirds of the qualified voters.

Certain general legislation is then referred to, and it is shown that privileges that might arise under these laws are of no practical value "until the power to subscribe was, in some form, given to the municipalities."

It is then said, in the last paragraph of the opinion: "It is of no importance that two-thirds of the qualified voters of the city gave their assent to the subscription at the election which was called. It has been uniformly held that until the legislature authorizes an election, a vote of the people cannot be taken *which will bind the municipality, or confer upon the municipal authorities the power to make such subscription*. The legislative authority to obtain the popular assent, is as essential to the validity of the election as it is to the subscription."

This, it seems to us, was not intended as an authoritative construction of the language of the constitution of Missouri, on the question whether antecedent legislation is necessary to enable the qualified voters to give their assent to a proposition to take stock in a railroad enterprise. On the contrary, the phrase "it has been uniformly held," manifestly relates to the well settled general principle that there must be permissive authority, constitutional or statutory, given beforehand, or some act of ratification afterwards. It does not import that it has been uniformly held in the construction of the constitution of Missouri, that the vote cannot be taken without preliminary legislation. We have found no case in Missouri, any more than in Mississippi, in which such a construction has been given to the clause in question.

Again, the question in the mind of the court was, what is required in order to bind the city, and to impose upon it a legal obligation; and the idea which was intended to be negatived was, that a municipal corporation could by any vote of its people, acquire the power to subscribe for stock and issue bonds. In other words, a vote of the people which will bind the municipality, or confer

upon it the power to make such a subscription, must be authorized by law.

In this case of Allen vs. Louisiana, the charter authorized the election to be ordered and the vote to be taken, and it appeared that not only two-thirds of the qualified voters but, to a moral certainty, a majority of the resident taxpayers, voted for the subscription. Yet the bonds were held void because the law under which the election was held, and the bonds issued, only authorized an election to ascertain the will of a majority of the resident taxpayers. The special power under which the election was held, and which was recited in the bond, excluded the question whether an election to ascertain the will of the qualified voters might not have been held under the constitution, without the aid of special legislation.

In the case now before the court, the bonds recited on their face that they were issued "*under authority of the Constitution of the State of Mississippi.*"

II.

It is conceded that the vote was taken, and the stock subscription in this case made, without the previous passage of any act of the Legislature authorizing the same; and that the validity of the coupons sued on depends mainly upon the effect and operation of the confirmatory act of March 16, 1872.

Regularly, after the vote was taken, there ought to have been an act passed to authorize the subscription on the terms proposed; but this was not done. Immediately after the vote was ascertained, the city made the subscription, and agreed to deliver the bonds as soon as they could be prepared, and the Railroad Company issued certificates for the stock in favor of the city.

The ratifying act was passed after the vote, and after the subscription, but before the actual execution and delivery of the bonds.

The issuance of the bonds was a part of the proposition voted on, and was a condition of the subscription; but they were actually delivered to the company after the passage of the act.

The 4th section of this act provides, "that all subscriptions to the capital stock of the Selma, Marion and

Memphis Railroad Company, made by any county, city or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized, ratified and confirmed."—[Appendix III.]

This act legalizes, ratifies and confirms "all subscriptions" to the stock of the company by any county, city or town. This, of course, includes all the terms and conditions of the subscription, so far as the Legislature had power to authorize them originally, including the issuance of bonds in payment of the subscription.

Had there been no stipulation for the issuance of bonds, the ratification of the subscription would, without some negative words, have ratified any bonds previously issued, or would have authorized the subsequent issuance of bonds as the evidence of the debt.—[Lynde vs. Winnebago Co., 16 Wall. 6.]

But where a different mode of payment is provided, the mode prescribed is exclusive of all others, and the power to issue bonds will not be implied.—Wells vs. Supervisors, 102 U. S., 625.

This section, however, contains one qualification, to-wit: only such subscriptions are ratified "*which were not made in violation of the Constitution of this State.*

This clause was unnecessary, for the Legislature could not give validity to any act done in violation of the Constitution.

The only requirement of the Constitution on this subject is, that such subscriptions shall not be authorized without the assent of two-thirds of the qualified voters, expressed at a special or regular election. A subscription made "in violation of the Constitution," is, therefore one made without the assent of the voters expressed in the manner prescribed. As the Legislature could not in 1872 originally authorize a subscription to be made without the assent of the voters, so it did not assume to legalize a subscription previously made without such assent.

The essential matter, and the only thing alluded to in the clause in question, is the assent of the people.

The legal doctrine of ratification is fully expressed by the rugged Latin maxim, "*omnis ratihabitio retrotrahitur, et mandato priori æquiparatur.*"

The principle, in its application to legislative acts of ratification, is clearly stated in Bissell vs. Jeffersonville,

24 How. 295. "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State Legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority."

The cases in which this principle has been asserted and applied by this court are too numerous to be cited. Most of them are referred to in the text books referred to below. The last reported case is that of Otoe County vs. Baldwin, 111 U. S. 1, 15.

No doubt the legislature might pass an act beforehand, authorizing an election to be held to ascertain whether the voters would assent to such a subscription.

This being so, then it seems clear that the legislature may, by a retrospective act, adopt and ratify an election held without such previous authority, and thus give efficacy to bonds issued under such irregular election. Judge Cooley says "On the same principle, legislative acts validating invalid contracts have been sustained. When these acts go no further than to bind a party by a contract which he has *attempted to enter into*, but which was invalid by reason of personal disability to make it, or through some legal formality, or in consequence of some ingredient in the contract forbidden by law, they cannot well be obnoxious to constitutional objection."

Const. Lim., 374.

Again on page 379 he says: "We have already referred to the case of contracts by municipal corporations, which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action. If the contract was one which the legislature might have originally authorized, the case falls within the rule we have laid down, and the legislative action is sustained. Some of the cases where municipal subscriptions in aid of railroads were held valid, were cases where the original undertaking was without authority of law, and was confirmed by retrospective act of legislation."

1 Dillon on Mun. Corp., § 46.
Jones on Railway Sects. §278.
2 Dan'l Neg. Inst. §§ 1556–1560.
Pierce Am. R.R. Law, pp102–103.

The passage in Cooley 371 applies only to cases where something has been omitted which was required to be done, but which the legislature might have dispensed with beforehand. In such cases a retrospective law dispensing with it will be sustained.

A number of cases decided by this court, in which this principle was affirmed, are very similar to the case now in question.

Thompson vs. Lee County 3, Wall. 327, already referred to.

The constitution of Iowa prohibited the creation of a debt until *the law* shall have been submitted to the people and approved by a majority of votes cast at a general election. Certain acts were passed under which it was claimed that Lee county was given power to take stock and issue bonds, and a vote of the county was taken, which resulted in favor of the subscription. The validity of this vote was contested, and the State Court decided it to be invalid, and to confer no power to issue bonds. The Legislature then passed an act to legalize the vote taken, and the issue of the bonds, and they were accordingly issued.

Payment of these bonds was resisted, among other things, on the ground that no power to take the vote had been delegated to the county; and on this point the court say: "It is not instructive to inquire into the different laws of Iowa under which this power is claimed to exist, because the Legislature of that State, on the 28th day of January, 1857, by an act of confirmation, legalized the issue of these bonds. If the Legislature could authorize this ratification, the bonds are valid," etc. The power to ratify, the court treat as too plain for question.

Here, then, was a constitutional prohibition to create a debt without a submission to the people; a vote taken without previous legislative authority; and, the Legislature having passed an act to legalize the issue of the bonds, it was held immaterial to inquire whether there had been a previous act authorizing the vote to be taken. The case seems precisely in point.

In Commissioners vs. Thayer, 94 U. S. 631, it is said, (p. 640) "The *approval* of the *electors* by their vote, at a meeting called for that purpose is *the object* of the statute. *Defects*, irregularities and informalities, which do not affect the result of the vote, do not affect its validity."

And a curative act of Kansas to the effect that where a majority of the voters had previously voted in favor of it, the subscription should be made and bonds issued, whether the orders and elections had been in compliance with the statutes or not, was held effectual to cure all defects, etc. "This act was intended to aid, and not to destroy," etc.

In Beloit vs. Morgan 7, Wallace 619, it was insisted that the bonds were made without any legal authority. After this controversy had arisen, the legislature of Wisconsin created the city of Beloit, carving it out of territory of the former town of Beloit; and in the charter of the city, provided that all bonds heretofore issued by the town of Beloit *shall be paid* by the city and town in proper proportions.

This language the court held, "distinctly affirms, and the affirmation is repeated, that the bonds shall be paid. The only point to be considered is the effect of this provision. That it is not an open question in this court.

In the case of Ritchie vs. Franklin county, 22 Wall. 67, the Legislature of Missouri had authorized the county to borrow money, and issue bonds for certain purposes, but required the previous approval of a majority of the voters. The county of Franklin borrowed money and issued bonds without the approval of the voters, and similar bonds issued in like manner by another county were declared void by the Supreme Court of the State. Thereupon the legislature passed an act to authorize these counties to issue new bonds, and Franklin county took up the first issue, and issued new bonds in lieu of them.

The new bonds were held valid. The court says: "But whether it, (the latter statute) be treated as an original power or as curative and confirmatory legislation, it is equally valid."

In St. Joseph vs. Rogers, 16, Wall. 644, a vote of the people had been taken before the passage of a law authorizing it. The act was afterwards passed, requiring a vote, and the bonds were issued without a second vote being taken. Subsequently an act was passed to validate the election so held. Payment of the bonds was resisted on this and other grounds. The court say: (p. 660). "Objection is made to the preliminary proceedings because the election approving the subscription was held before the act was passed giving such authority to such municipalities,

but two answers are made to that objection, either of which is decisive. * * * * * 2. Because the legislature passed a subsequent act declaring such subscriptions legal and obligatory." Again, on this subject, p. 665, the court say: "Concede, however, that a prior act is insufficient to dispense with the preliminary election, still the concession cannot benefit the defendants, as it is clear that the subsequent act entirely obviates all the mistakes and irregularities in the prior proceedings." [See Elmwood vs. Marcy, 92 U.S. 297, for Justice Strong's observations on this case.]

It is true the condition runs through all these cases, that in order to make the ratifying act valid, the legislature must at the time possess the power to authorize that to be done, which it proposes retrospectively to ratify.

The question here is not whether the legislature in 1872 possessed the power to authorize municipal subscriptions to railroads *without the assent of two-thirds of the qualified voters*. On the contrary, the question is, whether the legislature had power to *authorize a vote to be taken*, and a subscription to be made, *upon the assent of the required majority*.

If it possessed the power to authorize the vote to be taken, then it had the right to ratify and validate a vote taken in advance of such authority, provided it was taken in compliance with the constitutional restriction.

If it had power to authorize a subscription on compliance with the constitution, then it could ratify a subscription made in advance of the authority, not in violation of the constitution.

In Supervisors vs. Schenck, 5 Wall. 772–774, the order for the election was made by the County Court without any authority, instead of by the Supervisors in whom the power was vested; but the election was held, and the Supervisors acted upon it, made the subscription, issued the bonds, received the stock and held it for ten years, and this was held to be a ratification of the act of the County Court.

In Commissioners vs. January, 94 U. S. 102, the order for the election was made under one act, which was repealed before the time fixed for the vote, and was substituted by another law covering the same subject. Nevertheless the vote was taken under the original order, and

the bonds issued in pursuance thereof were held valid, because the Commissioners went on and issued bonds reciting that the law had been complied with.

Defendant's counsel contend that the legislature can only cure irregularities in the exercise of a *granted power*, but cannot validate acts that are *void* for want of an *existing power*.

There is really no such distinction, though some of the cases do speak of curing irregularities in the exercise of granted powers. It would be in consistent with the essential nature of a ratification, which is said to be equivalent to a prior mandate.

The proposition that a void estate is incapable of confirmation, is a technical doctrine of the common law in relation to the creation and passing of estates.

2 Co. Litt. 416, (516,) 295 b.

The extent of its application nowadays may depend on the meaning of the words "void" and "voidable." The best definition of them we have found is that given in Pearsoll vs. Chapin, 44 Pa. St. 9. It is there said (p. 15): "The terms void and voidable, as used in our books, would, therefore, seem to stand for absolutely and relatively void. That is *absolutely void*, which the law or the nature of things forbids to be enforced at all; and that is *relatively void* which the law condemns as a wrong to individuals, and refuses to enforce against them. And again (p. 16), "a contract is not so void, when only relatively void, as to prevent the party intended to be injured by it from renouncing the privilege which the law allows him of rejecting it altogether, or from ratifying it, and making it his own."

This clear statement of the law relieves the subject of all difficulty. If a contract is absolutely void, that is, if it is one which the law will not enforce at all, it cannot be ratified or confirmed by the parties, for the act of confirmation would necessarily be as void and illegal as the original contract.

But if only relatively void, that is, void as to the party affected by it, for want of authority to bind him, he may adopt the act, and ratify it, so as to make it binding upon him. This embraces all cases of assumed agency, and thereby acts done without any authority whatever, and therefore void as to the principal to be affected by

them, become valid and binding by his subsequent adoption and ratification.

This is the rule where the party affected by the unauthorized act of an assumed agent, sees proper to adopt and confirm such act. It is recognized by the Supreme Court of Mississippi, in the case of Sykes vs. Columbus, 55 Miss. 144, where they say, in reference to the ratification by the principal of an unauthorized act done by a person who assumed to be his agent: "The act had no validity of itself, but the ratification relates to the time of doing it, and is of the same import as original authority."

See also Story on Agency, §§ 239–244.
Wharton Ag. §.

But the rule has no application to ratification by a legislative act. Where the legislature undertakes to ratify, or rather to validate an act already done without antecedent legislative authority, the only question is one of constitutional power. It does not at all depend on whether the act proposed to be validated was, by the principles of the common law, void or voidable, absolutely or relatively void. The very doctrine that a void estate is incapable of confirmation, exists only during the pleasure of the legislature; and when an act is regularly passed to confirm a void estate, or a void contract, such act necessarily repeals to that extent the pre-existing law.

This principle is covered by the case of Railroad Co. vs. Otoe County, 16 Wall. 667, although in that case, it was a general statute, and not a principle of the common law, that was held to be superseded by a special act in favor of a particular corporation.

In Mattingly vs. District of Columbia, 97 U. S. 690, a void assessment of taxes, void for want of authority to make it, was validated by a subsequent statute.

Indeed, all the decisions of this court affirming the validity of bonds issued to railroads under legislative acts ratifying and confirming their issuance, assume that the bonds would be void but for the operation of the curative acts.

III.

It is, perhaps, not important on this argument to rely on the doctrine of estoppal arising by the recitals in the bonds, as the facts are fully alleged in the declaration, and

are admitted by the demurrer, but if the act of ratification passed March 16, 1872, is held to be equivalent to a prior authority to make the subscription and to issue the bonds, subject, however, to the constitutional requirement of the assent of two-thirds of the qualified voters, the recital will be conclusive evidence that the popular vote was taken in the proper manner, and that the proposition received the assent of the required number of voters.

The recital is in this form: "This bond is issued under and in pursuance of an order of the Board of Mayor and Aldermen of the city of Holly Springs, Marshall county, State of Mississippi, *made under authority of the constitution* of the State of Mississippi, and *the laws of the legislature* of the State of Mississippi, and authorized by a vote of the people of the said city of Holly Springs, at a special election held for the purpose."

The prior authorities were cited and reviewed in Buchanan vs. Litchfield, 102 U. S. 278, and it is there shown that a general recital that the bonds were issued "in pursuance of," or "in conformity to," or "by virtue of" the law, is sufficient to estop the municipality from raising any question as to the fact of a popular vote, or as to its regularity, as against a bona fide holder. If the bonds in that case had made the recital that they were "issued in accordance with the constitution," they would have been held valid. This principle is reaffirmed in Black vs. Commissioners, 99 U. S. 686; Northern Bank vs. Porter Township, 110 U. S. 619; Dixon County vs. Field, 111 U. S. 83. The Mississippi cases already cited from 51 Miss. 111; 56 Id. 115; 57 Id. 806; and 59 Id. 236, all expressly recognize the same doctrine.

So, taking and holding the certificates of stock, issuing and delivering the bonds, paying the interest for a series of years, and voting the stock in the election of directors, and other corporate meetings, will cure any defect as to the order for an election, and will waive other irregularities. Commissioners vs. January, 94 U. S. 202, 206; Supervisors vs. Schenck, 5 Wall. 772; Pendleton vs. Amy, 13 Wall. 305; Ray vs. Vansickle, 96 U. S. 687-8.

We submit that the judgment of the court below ought to be reversed.

H. T. ELLETT,
Counsel for Plaintiff in Error.

APPENDIX.

I.

AN ACT to incorporate the town of Holly Springs, in the County of Marshall. Approved, May 12, 1837; p. 252.

SECTION 2. *Be it further enacted*, That the territory comprised within the limits of said town, shall constitute a district for the election of one Justice of the Peace, and one Constable in the said county of Marshall. That any Justice of the Peace in the said county shall and may hold an election at the courthouse in the said town and district, on the first Monday in August next, between the hours of ten and four o'clock, giving at least ten days notice, for the election, by ballot, of one Justice of the Peace and Constable, who shall be commissioned with such powers as belong to like officers, for two years; and also for the election of five selectmen of the said town, who shall hold their offices for one year; and all subsequent elections for said officers, shall be held annually or bi-ennially, as the case may be, on the first Monday in August, in each and every year thereafter, at the courthouse in said town, under the superintendence of the Justice of the Peace and five selectmen of the town.

SEC. 4. *Be it further enacted*, That all persons who are residents in the said town, and qualified to vote for members of the State Legislature of this State, shall be qualified to vote for officers in the said town.

II.

AN ACT to amend the several acts heretofore passed by the Legislature incorporating the town of Holly Springs, in Marshall County. Approved, November 19, 1857; p. 91.

SECTION 2. *And be it further enacted*, That the territory embraced within the limits above defined, is hereby united to that specified in former laws, and, together shall consti-

tute the city of Holly Springs; and that the inhabitants of said city, as above defined, are hereby constituted a corporation and body politic, by the name and style of the Mayor and Aldermen of the city of Holly Springs, and by that name they shall have perpetual succession, and may sue and be sued in all courts of law and equity; (after conferring ordinary corporate functions, this section concludes thus), *and may do and perform all other acts as natural persons, or which may be incident to town or city corporations;* they shall have and use a common seal, and may break, alter or change their seal at pleasure.

Section 3. The city of Holly Springs shall have five wards, the boundaries of which may be fixed by the Board of Mayor and Aldermen, and may be changed as they may see fit from time to time, always having regard to the number of free white inhabitants, so that each ward may have, as near as may be, the same number of free white inhabitants, the wards at present established to remain until altered by the Aldermen. And there shall be chosen from said city, annually, as hereinafter directed, by the qualified electors of the city, one Alderman for each of the aforesaid wards. That the Mayor of said city shall be the President of Board of Aldermen so to be elected.

Section 5. The chief executive officer of the city shall be the Mayor, who shall be elected by the qualified voters of the city, at the time and place prescribed by the original charter of incorporation for the election of the City Justice of the Peace, and shall hold his office for the period in said act prescribed; and in addition to the powers conferred upon him as Mayor, he shall have all the powers of a Justice of the Peace in and for said county of Marshall, according to the provisions of the original acts of incorporation.

Section 10. A general election for Mayor or City Justice of the Peace, and Aldermen, shall be holden at the times and place provided in the charter of incorporation, to which this is an amendment; and those heretofore elected as Selectmen, and those to be elected under this act, shall be Aldermen of the city of Holly Springs.

III.

An act to facilitate the construction of the Selma, Marion and Memphis Railroad, Approved March 16, 1872. P. 313, of Pamphlet Acts.

Section 1 authorizes the company to change the guage of the road.

Section 2 extends to this company the benefit of State aid granted to other railroad companies.

Section 3 authorizes the company to obtain the State's title to certain lands forfeited for non-payment of taxes.

Section 4. *Be it further enacted*, That all subscriptions to the capital stock of the said Selma, Marion and Memphis Railroad Company, made by (any) county, city or town in this State, which were not made in violation of the constitution of this State, are hereby legalized, ratified and confirmed.

Section 5 authorizes the company to build a "span-bridge" across the Tombigbee.

Section 6. That this act shall take effect and be in force from and after its passage.

Supreme Court of the United States.

OCTOBER TERM, 1884.

J. ADDISON HAYS,

No. 200. *vs.*

CITY OF HOLLY SPRINGS.

Since the printed brief in this case was filed, the questions involved have been settled in favor of the plaintiff in error, by the decision in Grenada County vs. Bragdon & Co., at the present term of this court. (The Reporter, vol. 19, p. 65.)

An act of the Legislature was passed March 25, 1871, authorizing Grenada County to hold an election to take the sense of the people on a proposition to subscribe to the stock of the Grenada, Houston and Eastern Railroad Company. The vote was taken, not only on that proposition, but also on another proposition, to subscribe to the capital stock of the "Vicksburg and Grenada Railroad Company," which latter vote was not authorized by the act. In fact no such company as the Vicksburg and Grenada Railroad Company had then been incorporated. After the vote had been taken, the Vicksburg, Yazoo Valley and Grenada Railroad Company was chartered to build a road from Grenada to Vicksburg.

Subsequently the Grenada, Houston and Eastern Railroad Company was empowered to extend its road from Grenada to Vicksburg, and its name was changed to the Vicksburg and Nashville Railroad Company. By the

same act, and in order to aid in the construction of the road from Vicksburg to Grenada, the vote previously taken as before stated, was ratified and confirmed to the Vicksburg and Nashville Railroad Company, and the county of Grenada was authorized to subscribe to the stock and issue its bonds.

Thus it appears that two questions were directly involved, to-wit:

1. Whether the constitution of Mississippi imperatively requires, as a condition of the validity of the vote, that there should be antecedent legislation authorizing it to be taken, and

2. Whether the legislature has power to ratify and confirm a vote taken in accordance with the requirements of the constitution, without such previous legislation, so as to make valid bonds that have been issued in pursuance of such vote.

In reference to these questions, the court, in the opinion by Mr. Justice Harlan, say:

"Had the action of the voters and of the Board of Supervisors been taken under legislative authority previously conferred, there would be no doubt of the validity of the subscription, or of the power of the Board of Supervisors to issue bonds. * * * * * * * While the legislature could not, after the adoption of the constitution of 1869, have legalized a municipal subscription assented to by a less majority of legal voters than is prescribed in that instrument, its power, by retrospective enactment, to confirm and legalize a municipal subscription to the stock of a railroad corporation to which the constitutional majority of electors had assented at an election of which due notice was given, cannot, we think, be successfully disputed. Since what was done in this case by the constitutional majority of qualified electors, and by the Board of Supervisors of the county, would have been legal and binding upon

the county had it been done under legislative authority, previously conferred, it is not perceived why subsequent legislative ratification is not, in the absence of constitutional restrictions upon such legislation, equivalent to original authority."

This decision seems to cover all the questions in the case now before the court, except such, if any, as may arise upon the construction of the ratifying act of March 16, 1872. That act ratifies, legalizes and confirms all subscriptions "which were not made in violation of the constitution of this State." The only requirement of the constitution is that such subscriptions shall not be authorized unless two-thirds of the qualified voters, at a regular or special election, shall assent thereto. The subscriptions intended to be legalized are therefore such as were not made without, or such as were made with, the assent of two-thirds of the qualified voters, expressed at a regular or special election.

The declaration avers, and the demurrer admits, that this condition was complied with.

H. T. ELLETT,
For Plaintiff in Error.

114-120

Office Supreme Court U. S.
FILED.
FEB 4 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT

OF THE UNITED STATES.

J. ADDISON HAYS

VS.

THE MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS.

BRIEF FOR DEFENDANT IN ERROR.

HOLLY SPRINGS, MISS.:
HOLLY SPRINGS SOUTH, JOB PRINT.
1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

J. ADDISON HAYS, *Plaintiff in Error.*

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS, A MUNICIPAL CORPORATION, *Defendant in Error.*

The bonds described in the Plaintiff's declaration are alleged to have been issued by the municipal corporation of Holly Springs, with the coupons thereunto attached, and delivered to the Selma, Marion and Memphis Railroad Company on the first day of January, 1872, in payment for stock subscribed by the said municipal corporation to said railroad company. The amount of the stock so subscribed is alleged to be Seventy-five Thousand Dollars. This action is brought upon overdue coupons issued with, but now detached from, said bonds. The bonds and coupons are inseparably connected, and the validity of the bonds necessarily determines that of the coupons; they stand or fall together. *Lexington vs. Butler*, 14 *Wallace*, pp. 296-7.

The Plaintiff in error presents his case in his declaration—the authority for the issuance of the bonds and coupons, and the manner of its exercise—and to that declaration, the defendant in error files a demurrer.

This investigation must therefore be confined to the questions

of law arising on the issue so presented. The bonds and coupons were issued by the municipal corporation of Holly Springs, a public, and not a private corporation. They were issued to the Selma, Marion and Memphis Railroad Company, a private, and not a public corporation. There is a marked difference between a public and a private corporation. Negotiable instruments issued by private corporations, such as banks, insurance companies, railroad companies, &c., are often held to be valid, when the same character of instruments, if issued by a public corporation, could not and would not, be sustained. The distinction between the two is accurately drawn by a modern writer, in the following language: "A municipal corporation is an involuntary organization of the inhabitants within certain local confines, of all ages, sexes and conditions, under the will and direction of the legislative branch of the government, by which they are clothed with a corporate character for the purpose of local government."

"A private corporation is a voluntary association of persons capable of contracting, to enter a joint enterprise of private business, and is clothed by the legislature with a corporate character for the purpose of carrying on such private business."

"A municipal corporation is involuntary. The inhabitants within its limits need not accept—nay, may protest against—its charter, but they are clay in the hands of the potter, and the legislature, at its sovereign will, may mould them into a municipal corporation, and then may dissolve and change it at pleasure. It may erect, divide and abolish at pleasure. But a private corporation can only be formed by the voluntary act of each member."

"A municipal corporation is composed of all the inhabitants within its limits, men, infants, lunatics and married women, but a private corporation can only be formed of those whom the law designates and who are capable of contracting. A municipal corporation involves no contract between its members. A private corporation involves a contract by its members *inter sese*, whereby, as against each other, they acquire vested rights and privileges for the agreed consideration. A municipal corporation involves no contract between the State and itself, and none between the State and its members. A private corporation must accept its charter; and when accepted, it is a contract between the State and the artificial

person constituted by it: and also between the State and the members composing it, subject only to such control as the State may reserve, or be entitled, in its sovereign capacity, to exercise over it. In a municipal corporation, the members are not shareholders. They need have no interest in it; and if any, their voice in the corporation is not proportioned to that interest. In a private corporation, the members are shareholders and their influence is proportionate to their interest. A municipal corporation is purely for purposes of local government. A private corporation is formed for the purpose of private business. A railroad company is a private corporation. A city is a public and a county is a *quasi* public corporation.--2 *Daniel on Negotiable Instruments* § 1519. Judge Dillon says "there is no resemblance between private and public, or municipal corporations, in regard to their issue of negotiable instruments. The latter (public corporations) are simply agencies of government. They are not organized for trading, commercial, or business purposes. They have, in general, but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years, in England, such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper."

"Private corporations are much more vigilant and watchful of their interests than it is possible for public, or municipal, corporations to be. The frauds which unscrupulous officers will be enabled successfully to practice, if an implied and unguarded power to issue negotiable securities is recognized, and which the citizen will be helpless to prevent, is a strong argument against the judicial establishment of any such power."—*Dillon, Law of Municipal Bonds*, pp. 13 and 14.

"A railroad company is a private corporation."—*Cooly's Constitutional Limitations*, pp. 191, 193 and 194.

The foregoing principles are recognized by all expounders of the powers, duties, and liabilities of corporations, and we ask that they shall not be overlooked, but applied to the facts of this case.

We propose now to discuss the following propositions, which we think, cover the entire case presented by the record.

I

First.—That the bonds and coupons were issued without

authority, either express or implied, and are void, not only as between the original parties, but in the hands of all subsequent holders for value, without notice.

II

Second.—That if the authority had been conferred on the corporation of Holly Springs to make the subscription and issue the bonds, that authority could only have been exercised, or carried out, in the mode prescribed by Section 14 of Article 12, of the Constitution of the State, and that no law was ever passed to authorize the power to be exercised in that way, and the bonds and coupons are void on that account. That the assent of two-thirds of the qualified voters within the corporate limits of Holly Springs was never obtained.

III

Third.—That the bonds and coupons being absolutely void, could not be rendered valid by subsequent acts of the corporation, nor by subsequent legislation, and that the curative act of the Legislature of Mississippi, of March 16th, 1872, imparts no validity to them.

IV.

Fourth.—That the acts of the same unauthorized and illegal agents in voting the stock and paying the interest on the bonds after their issue, does not estop the corporation from setting up any defense it may have to them, nor does it impart any validity to the bonds.

V.

Fifth.—That all the questions involved in this case have been decided by the Supreme Court of Mississippi, and that this Court will follow its decisions in construing its own Constitution and Statutes, and the contract sued on.

I.

First Proposition.

The bonds and coupons were issued without authority conferred on the corporation of Holly Springs by its charter, or any other

act of the Legislature, authorizing it to subscribe for the stock, and issue its bonds in payment thereof. The corporation must have had the power to issue them, at the time they were issued, conferred, either in express terms, or by necessary implication, and the want of such power rendered them null and void, not only as between the original contracting parties, but in the hands of all subsequent purchasers for value, without notice.

We concede, that if the power to subscribe for the stock, and issue the bonds for its payment, had been conferred on the corporation, that mere irregularities, or informalities in executing, or carrying it into effect, would avail the corporation nothing, as against an innocent holder for value, without notice. But the power, the authority, to do the acts—subscribe and issue bonds—must exist, must be vested in the corporation; otherwise all its acts are null and void, in subscribing and issuing bonds. No doctrine has been so often repeated by this Court, within the last twenty years, as the foregoing, in the numerous cases brought before it, involving the validity of county, township, and city bonds. In the following cases, such bonds were held null and void for the want of the authority—the power to issue them.

Aspinwall vs. Davies Co. 22 Howard, 364;
Marsh vs. Fulton Co., 10 Wallace, 681;
Thomas vs. the city of Richmond, 12 Wallace, 356;
Police Jury vs. Britton, 15 Wallace, 371;
The Mayor vs. Ray, 19, Wallace 475;
Concord vs. Portsmouth Bank, 2 Otto, 627;
Wells vs. Supervisors, 12 Otto, 625;
Harshman vs. Bates County, 2 Otto, 572;
Buchanan vs. Litchfield City, 12 Otto; 278;
Ogden vs. County of Davies, 12 Otto, 634;
Allen vs. Louisiana. 13 Otto, 80.

In one of its latest decisions, this court says, "if the power exists in the municipality the bona fide holder is protected against mere irregularities in the manner of its execution; but if there is a want of power no legal liability can be created." *Northern Bank vs. Porter Township, U. S. rep.* 110, *p.* 618. *In the case of Dixon county vs. Field, U. S. rep.* 111, *pp.* 87, 88, 89 *and* 90, this question is fully discussed and clearly settled.

In the following cases, the bonds were sustained, the power to issue them was fully conferred, and the defences set up showed mere irregularities, defects, or informalities in carrying out and executing the power. But the necessity for the legislative authority to issue them was as fully recognized, and insisted on, as in the preceding cases, in which they are held void.

Knox County vs Aspinwall, 21 Howard, 539;
Amy vs. Alleghany City, 24 Howard, 370;
Woods vs. Lawrence County, 1 Black, 388. § 7;
Moran vs. Miami County, 2 Black, 722;
Mercer vs. Hackett, 1 Wallace, 93;
Meyer vs Muscatine, 1 Wallace, 386;
Van Hastrop vs. Madison, 1 Wallace, 293;
Gilpeke vs. Dubuque, 1 Wallace, 205 and 206.
Havemeyer vs Iowa City, 3 Wallace, 294;
Thompson vs Lee County, 3 Wallace, 328;
Sheboygan vs Parker, 3 Wallace, 94 and 96;
Campbell vs. Kenashee, 5 Wallace, 195;
Supervisors vs Schenck, 5 Wallace, 779;
Beloit vs Morgan, 7 Wallace 619;
The City vs. Lamson, 9 Wallace, 479;
Grand Chute vs Winegar, 15 Wallace, 356;
Lexington vs Butler 14 Wallace, 294;
St. Joseph vs Rogers, 16 Wallace, 646 and 647;
Railroad Company vs. Otoe, 16 Wallace, 669;
Queensbury vs. Culver, 19 Wallace, 93;
Chambers County vs. Clews, 21 Wallace, 324;
Coleman vs Eaves, 2 Otto, 485;
Venice vs Murdock, 2 Otto, 497;
Comvisse vs Fort Scott, 2 Otto, 505;
Moultrie vs. the Bank, 2 Otto, 632;
Marcy vs. Oswego, 2 Otto, *supra;*
Humboldt vs Long, 2 Otto, *supra;*
Montclair vs Ramsdell, 12 Otto, 147;
Quincy vs Cook, 12 Otto, 551;

Pana vs. Bowler, 12 Otto, 539, 544;
Insurance Company vs Bruce, 15 Otto, 328;
Taylor vs. Ypsilanti, 15 Otto, 60;

Louisiana vs Taylor, 15 Otto, 454;
Stewart vs. Lansing, 14 Otto, 505;
Lincoln vs Iron Company, 13 Otto, 412;
Morgan County vs. Allen, 13 Otto, 498;
Walnut vs. Wade, 13 Otto, 683;
Jasper County vs. Ballou, 13 Otto, 751;
Anthony vs. the County of Jasper, 11 Otto, 696 and 697;

The same doctrine is applicable to all commercial paper. *The Floyd acceptances*, 7 Wallace, 676.--Where it is also said that commercial usage cannot be invoked to supply the want of authority, in the maker, to issue commercial paper.

The purchaser of municipal bonds must take notice of the law under which they were issued. He is chargable with notice of the law and of its limitations, as well as of all constitutional limitations upon the issue of such bonds. He must look and ascertain with what powers the corporation is clothed, for subscribing for stock in railroads and issuing bonds for its payment.

Quincey vs Cooke, 17 Otto, 551;
Walnut vs. Wade. 13 Otto, 295;
Buchanan vs Litchfield. 12 Otto, 289;
Ogden vs. County of Davies, 12 Otto, 640 and 641;
Anthony vs. County of Jasper, 11 Otto, 698;
Harshman vs. Bates, 2 Otto 570;
Coloma vs Eaves. 2 Otto, 484;
Concord vs. Savings Bank. 627;
Pendleton vs. Amy, 13 Wallace, 304;
Nugent vs. Supervisors, 19 Wallace, 253;
Daniel on Negotiable Instruments, §§ 1502, 1532.
Dillon on Municipal Bonds, 44 and 45;
Sykes vs the Mayor etc of Columbus. 55 Miss., 140;
Brady vs. Mayor. 20 N. Y., 312;
Swift vs. Williamsburg, 24 Barb., 427;
Hawkins vs. Carroll County, 50 Miss., 763.

"We may repeat here what was said in *Anthony vs. Jasper County* 101, U. S. rep., pp. 693 and 697,that purchasers of municipal bonds are charged with notice of the laws of the State, granting power to make the bonds they find on the market. This we have always held." *Northern Bank vs. Porter Township* 110 U.S.rep. p. 618. "All parties are bound to know the law; and a certificate reciting the

actual facts, and that thereby the bonds were conformable to the law, when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, to which power was denied, to usurp the forbidden authority, by declaring that its assumption was within the law. This would be the clear exercise of legislative power, and would suppose such corporate bodies to be superior to the law itself." *Dixon County vs. Field*, U. S. rep. 111, p. 92.

What is the effect of the certificate of the officers on the bonds in this case, to wit., "that they were issued in pursuance of an order of the Mayor and Aldermen of Holly Springs, made under authority of the constitution of the State, and the laws of the legislature, and authorized by a vote of the people of Holly Springs, at a special election held for the purpose," etc. This Court states the effect in the following language. "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with the authority to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact and binding upon the municipality." *Town of Col[illegible] vs. Exues*, 2 Otto, 491.

No stronger presentation of the principle in favor of the bondholder can be found in the decisions of this Court than the foregoing. In discussing the effect of the certificate, in a very late case. this court says: "And the estoppel does not arise, except upon matters of fact, which the corporate officers had authority by law to determine and certify." "Of course this (the certificate) "does not extend to or cover matters of law." *Dixon County vs Fields*, U. S. rep. 111 p 92.

Mr. Dillon states it as follows: "If there exists legislative authority, not in conflict with the State, or Federal, constitution, to issue the bonds, and they are duly executed by the proper officers, who are invested with authority under the law, with power to de-

cide whether conditions precedent have been performed, and they so declare, or recite, the issue of such bonds, under such circumstances and with such recitals, is conclusive as to the fact so stated and estops the municipality, in a suit on the bonds, to aver and prove the contrary."

Dillon on Municipal Bonds, § 22;
Murray vs. Oswego, 92 U. S. rep. 638;
Moran vs. Miami County, 2 Black, 732;
Mercer County vs. Hacket, 1 Wallace, 83;
Supervisors vs. Schenck, 5 Wallace, 784;
Pana vs. Bowler, Vol. 107, U. S. rep. 539;
Walnut vs. Wade, 103 U. S. rep., 683;
Buchanan vs. Litchfield, 102 U. S. rep., 291, and cases cited;
Anthony vs. Jasper County, Vol. 101, U. S. rep. 698;
Mayor vs. Muscatine, 1 Wallace, 384;
Commissioners vs. Nichols, 14 Ohio St., 260;
Cutler vs. Board of Supervisors, 56 Miss., 123 and 124;
Hawkins vs Carroll County, 50 Miss., 735.
Vicksburg vs. Lombard, 51 Miss., 126 and 127;
St Joseph Township vs. Rogers, 16 Wallace, U. S. rep. 644;

"The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals; but, the power existing, the municipality may be estopped by recitals to prove irregularities in the exercise of that power; or when the law prescribes conditions upon the exercise of the power granted, and commits to the officers of such municipality the determination of the question whether those conditions have been performed, the corporation will be estopped by recitals which import such performance." *Northern Bank vs, Porter Township*, 110, U. S. rep. 619.

It will be seen from the authorities above cited that the certificate is entirely worthless, although the bonds may be in the hands of an innocent holder for value, without notice, if the corporation had not the authority to issue them. If the corporation had the authority to issue them, and the law conferring the power on it, made it the duty of certain officers charged with the execution of the law—the issuance of the bonds—to ascertain and decide whether certain conditions pre-

cedent had been performed, and such officers did give a certificate, on the face of the bond, that they had been performed, the corporation would be estopped from showing, as against a *bona fide* holder, for value, without notice, that the facts set out in the certificate were untrue.

"Their recitals are such a decision; and beyond those, a *bona fide* purchaser is not bound to look for evidence of the existence of things *in pais*. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not, is a question of fact, the decision of which is by law confided to others—to those most competent to decide it." *Town of Coloma vs. Eaves*. 92 U. S. rep. 490. In *Dixon County vs. Fields*, U. S. rep., 111 p. 93, this court says, "But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admission."

If we are right, therefore, in our position that the bonds and coupons, in this case, were issued by the corporation of Holly Springs, wholly without authority, the certificate on the face of the bond cannot avail the Plaintiff in Error, anything. The certificate cannot supply the want of authority on the part of the corporation, to issue them, or the want of authority in the officers to give it.

But we insist that the certificate on the face of the bonds shows that the Plaintiff in Error bought, with full knowledge of the want of authority, on the part of the corporation, to issue them—with full knowledge of all the illegality in the whole transaction—the subscription and issuance of the bonds and coupons, as well as in the pretended election. Here is the certificate. "This bond is issued under, and in pursuance to, an order of the Board of Mayor and Aldermen of the City of Holly Springs, Marshall County, State of Mississippi, made under authority of the Constitution of the State of Mississippi, and the laws of the legislature of the State of Mississippi, and authorized *by a vote of the people* of the said city of Holly Springs, at a special election held for the purpose." The foregoing is copied from the Plaintiff's declaration, and is all of the certificate except the signatures and attestation. We have ex-

amined the decisions of this Court in search of a precedent for the above certificate, but can find none. In all that we find copied into the decisions, and commented on by the Court, the particular law authorizing the issuance of the bonds and the making of the subscription, is given by date, title, etc., so that it may be readily ascertained by reference to such law, whether the authority has been conferred, and how it is to be exercised, etc. But in this case, the purchaser in the market is pointed to all the laws passed by the legislature—to the whole Code. A purchaser of the paper in market could only look, and read, and satisfy himself, after examining the whole Code of Statute Laws of the State; and when he had closed his examination, he could truthfully say, he had found as much authority in one chapter, or act, as in another, and none, at all, from the beginning to the end of the Code. It is too general and indefinite in its terms to be of any value. The certificate states further, that the bonds were issued under the authority of the Constitution of the State. It states also that the bonds were authorized by a vote of the people of Holly Springs, at a special election, held for the purpose. Now, the 14th Section of Article XII, of the State Constitution, is in the following language:—"The Legislature shall not authorize any county, city, or town to become a stock-holder in, or to lend its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a special election, or regular election, to be held therein, shall assent thereto."—State Constitution, Art. XII, Sec. XIV.

Now this certificate states on its face that the bonds were authorized by a vote of the people of the city of Holly Springs, and not by a two-thirds vote of the qualified voters of the city, in the language of the Constitution, just quoted. There is a vast difference between an election, where qualified voters only are allowed to vote, and one where the people vote—where everybody votes The latter is but a mass-meeting, or, it may be a mob. The former is an election held under the sanction of the law, and where the votes cast, are cast by voters whose qualifications are defined by law and the election is held by the officers of the law.

Who voted at this people's election? Men, women, and children lunatics, idiots, and strangers might have voted at such an election

There was no way of preventing them, no legal restraints. Now the Plaintiff in Error saw, on the face of these bonds, when he bought them, that they had been issued without authority of law, and in violation of the Constitution of the State. He was bound to examine the law under which they were issued, and the Constitution of the State, which imposed a limitation upon their issue. *See authorities, supra.* But apart from this obligation imposed on him by law, the statements in the certificate were of such an unusual character as to put him on inquiry and lead him to a full examination of the law and constitution. That which excites enquiry and leads to notice, is equivalent to notice.

A man of ordinary prudence, on reading the certificate, would have known that there was something wrong in the whole transaction. The certificate was notice to the Plaintiff in Error that the conditions precedent had not been performed and would be fatal to him, even if the power to subscribe for the stock, and issue the bonds and coupons, had been fully conferred on the Defendant in Error by its charter or some other law.

The Plaintiff in Error cannot, therefore, hold the position of an innocent purchaser, without notice He was bound to examine the constitution of the State and laws of the corporation under which the bonds were issued, and when he did so, he found them without the sanction of law, and in violation of the State Constitution. If he failed to examine the constitution and laws, he is not an innocent holder; if he did examine them, he saw that they were illegal and void. *Claiborne County vs Brooks*, U. S. rep. 111 p. 409. He did not discharge the duties imposed by law on one claiming to be an innocent holder.

But we will now proceed to examine further the authority of the corporation to subscribe for the stock, and issue the bonds and coupons. It cannot be claimed under the charter of the Selma, Marion and Memphis Railroad Company, with which the contract was made, and to which the bonds and coupons were made payable, *or to bearer.* On the 23d day of November, 1859, the Selma, Marion and Memphis Railroad Company was incorporated under the name of "The Memphis, Holly Springs and Mobile Railroad Company." *Acts of* 1859, p 51. Section fifteen of this act adopts and incorporates into it, sections 17 and 18 of the act of

March 19th, 1852, incorporating the Mississippi Central Railroad Company, regulating county subscriptions to the capital stock of said Mississippi Central Railroad Company. *See acts of* 1852, for charter of said Company, p. 74. In 1867, an act was passed to revive and amend the act of 1859, above cited and to change the name of the company to "Memphis, Holly Springs, Okolona and Selma Railroad Company." *See acts of* 1867, p. 635. An Act was passed in 1870, changing the name of the company to "Selma, Marion and Memphis Railroad Company." *Acts of* 1870, p. 566. These are all the acts that could have any bearing on the validity of the bonds and coupons involved in this case. The foregoing laws, with the exception of the act of 1870, which simply changed the name of the Railroad Company, were passed under the constitution of 1832, which imposed no limitation on the legislature in authorizing towns, cities, or counties, to take stock in railroad, or other corporations. When the charter of this Railroad Company, with its amendments, has been examined, no authority can be found therein authorizing the corporation of Holly Springs to subscribe for stock in it, or to issue bonds for its payment. Sections 17 and 18 of the original Act, taken from the charter of the Mississippi Central Railroad Company of 1852, do authorize the Boards of Police of certain counties, lying on the line of the road, to take stock to a limited extent and on certain conditions. No one county could take more than Two Hundred Thousand Dollars in stock. The subscriptions were required to be paid by a tax levied and collected for that purpose by the Boards of Police. The tax collector was required to give the tax-payer a certificate showing the amount he had paid, and to what road, and these certificates were made transferable by endorsement. Any tax-payer when he had Fifty Dollars in certificates, either by payment of his own taxes, or by a transfer of certificates to him, was authorized to surrender his certificates, and to take a certificate of stock in the company for the same amount. The tax-payer became a stock-holder in the company, as above stated. But the Board of Police of the county could take no step in the matter of the subscription until they were authorized by a majority vote of the qualified electors of the county, cast at an election authorised by law, and held according to law. There was at that time no constitutional limitation requiring a two-thirds vote.

These sections limited the calls for payment of the stock subscribed and defined how they should be collected and paid over. Sections 17 and 18 did not authorize the Boards of Police to issue bonds in payment of stock so subscribed—nothing of the kind. But sections 17 and 18 do not embrace cities and towns—they apply to counties only; and this is a triumphant answer to any claim of authority for the issue of the bonds and coupons by the corporation of Holly Springs under the above named sections. At the time sections 17 and 18 were first enacted in 1852, flourishing towns—Jackson, Canton, Grenada, Coffeeville, Oxford, and Holly Springs—were on the immediate line of the road, but it had not then entered into the minds of our people to authorize cities and towns to become stock-holders in railroad corporations. The policy sprang into existence more than a decade after these sections were passed. The simple statement that towns and cities are not embraced in these sections—not mentioned in them at all—is enough; but it may not be out of place to show some of the powers and duties of the Boards of Supervisors, that the great difference between those boards and municipal corporations established for the local government of cities and towns may be made manifest. The line of distinction between county, town, and township subscriptions and bonds made and issued in the aid of railroads is well defined by this Court in the case of *Ogden vs. County of Davies*, 12 Otto, 640 and 641. Boards of Police were established by the Constitution of 1832, and so are Boards of Supervisors their successors, by the Constitution of 1869. *See Article VI., Section 20 Constitution of* 1869. Both had jurisdiction over roads, ferries and bridges. The Board of Supervisors orders county elections to fill vacancies that arise in county offices, and performs such other duties as shall be provided by law. See *Article VI. Section 20, supra*. And so did the Boards of Police. Boards of Supervisors may levy a county tax, limited strictly to county purposes, and not to exceed the levy made by the State. *Code of* 1880, § 2153. This Board directs the appropriation of county funds, but can appropriate none, except to objects authorized by law. *Id.* § 2158. It passes upon all claims against the county, allowing, or dis-allowing them. *Id.* § 2159. "They are *quasi* corporations with general jurisdiction over the subjects confided to them by the Constitution.

Article VI., Section 20, *supra.* But without any original, inherent power to make subscriptions, or issue bonds to railroad companies; and when such special power is conferred, it must be strictly construed." *Hawkins vs. Carroll Co.*, 50 *Miss.* 735. *Minturn vs. Larome*, 23 How. U. S. rep. 435. It has jurisdiction over the court house and jail of its county and may levy a tax to build or repair the same. *Code of* 1880, §§ 2149 and 2150. In short, it is established by the Constitution—it legislates when it levies a county tax, and it exercises judicial functions when it decides that a claim against the county is valid, or invalid; and it exercises police power in erecting bridges and clearing out and opening up public roads. The powers conferred on the Boards of Police under the constitution of 1832, were substantially the same.

By no known rule of construction could Sections 17 and 18 be held to embrace towns and cities which are not mentioned in them. But if they were clearly embraced in those sections, this Court has construed Sections 17 and 18, and held that whilst they may authorize subscriptions by counties to the stock of railroad companies, on certain conditions, they do not authorize counties, even, to issue bonds and coupons in payment of such subscriptions. That the mode of payment is prescribed by these sections in express terms, to wit., by taxation—and to that mode alone resort must be had.

That bonds and coupons issued under these sections, in payment of stock, are *ultra vires* and null and void. *Wells vs. Supervisors.* 12 Otto. 625. This was a case involving the validity of bonds issued by the county of Pontotoc to the Selma, Marion and Memphis Railroad Company. We think the argument is closed on this proposition, to wit; that no authority can be found in the charter of the Selma, Marion and Memphis Railroad Company—and we now proceed to the next. Is there anything in the charter of Holly Springs, in its act of incorporation, which authorized it to subscribe for the stock and issue the bonds and Coupons for its payment? We think not. That no direct authority giving the corporation the power, in express terms, can be found in its act of incorporation, or in any amendment thereto, is indisputable; but the authority is sought to be derived by implication from some of the express grants in its charter.

The Plaintiff in Error sets out, in his declaration, the following

language, taken from an act of the Legislature, passed on the 19th of November, 1857, entitled, An Act to amend the several Acts heretofore passed by the Legislature, incorporating the town of Holly Springs, in Marshall County, "that the Mayor and Aldermen may do and perform all other acts as natural persons, or which may be incident to town, or city corporations." *Act of November 19th, 1857.*

The Act of November 19th, 1857, from which the above quoted language is taken, seems to be a review and condensation of all prior acts incorporating said town. The town was first incorporated by an act of the Legislature on the 12th of January, 1837; this act was amended on the 9th of February, 1839; again, on the 25th of February, 1848; on the 5th of February, 1852; on the 19th of October, 1852; on the 27th of February, 1854; and then by the act of November 19th, 1857, all prior acts were incorporated into it, or so much as was necessary, and the balance repealed. The act of November 19th, 1857, was the act in force incorporating the town and defining its powers, when the bonds and coupons in controversy were issued. The first section of this act simply makes a change in the corporate limits of the town. The second section, from which the Plaintiff takes the language above quoted, is in the following words. "That the territory embraced within the limits above defined is hereby united to that specified in former laws, and together shall constitute the city of Holly Springs, and that the inhabitants of said city, as above defined, are hereby constituted a corporation and body-politic by the name and style of the Mayor and Aldermen of the City of Holly Springs, and by that name shall have perpetual succession; and by that may shall sue and be sued in all courts of law and equity; may purchase, receive, and hold property, real and personal within the city, for all needful purposes of the city, and may lease, sell, and dispose of the same for the use and benefit of the city. And may also purchase, receive, and hold property, real, personal, or mixed, beyond the limits of the city to be used for the burial of the dead, and may sell, lease, and dispose of the same for the benefit of the city, and may do and perform all other acts as natural persons, or which may be incident to the town or city corporation. They shall have and use a common seal, and may break, alter, or change their seal at pleasure."

We give the whole section to show where the language relied on is to be found, and in what connection. This act of incorporation contains twenty-nine sections, and confers on the Mayor and Aldermen such powers, and such only, as are to be found in all acts of our Legislature, establishing local, town, or city governments. They—the inhabitants—are made a corporation by the name and style of the Mayor and Aldermen of the city of Holly Springs, and clothed with authority over all matters of police within their limits, and may make all such orders and ordinances as they may deem necessary for the good government of the town, not inconsistent with the Constitution and laws of the State—may levy and collect a tax to be expended in supporting the city government only; may license traders, merchants, etc., and do such other acts as are usually done by a local, municipal, town government. Now subscribing for stock in a railroad company and issuing bonds for its payment is not one of the ordinary and usual powers of a municipal corporation, but foreign to the object of its creation, and can only be claimed by it under direct legislative authority conferring it in express terms, or by necessary implication.

The Supreme Court of Mississippi says, "It has been settled by unanimous concurrence of the courts (so far as we have examined) that a municipal corporation has no implied authority to issue bonds or other securities, or to borrow money, or contract debts, in aid of a railroad company, either as a donation, or to purchase stock." *Sykes vs the Mayor of Columbus*, 55 Miss., 138. This decision was made on bonds issued by the town of Columbus to the same Selma, Marion and Memphis Railroad Company.

This, the court of last resort, has gone to the same extent. "Has a city the power, without express legislative authority to issue its paper, clothed with all the attributes of negotiability?" To this question an emphatic negative is given. "Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers, and the creation of specific means excludes others. Taxation is the legitimate mode for raising funds to meet their obligations. They are not trading corporations. The idea that they have incidental power to issue negotiable instruments is the growth of a modern misconception of their true object

and character. If necessary to borrow money, or issue bonds, the legislature can confer the power, with proper limitations and restraints. Without this authority, it cannot be legally exercised. The bond-holder takes it subject to the risk that it has been lawfully and properly issued." I regret that I cannot quote the whole of this opinion, it is so applicable to the case now under consideration. *The Mayor vs. Ray*, 19 Wallace, 475 to 479. To the same effect are the following cases:

Police Jury vs Britton, 15 Wallace, 566;
Lynde vs. the County, 16 Wallace, 6;
Quincey vs. Cooke, 17 Otto, 551;
Wells vs. Supervisors, 12 Otto, 625;
Head vs. Providence Ins. Co., 2 Cranch, 127—169;
4 Wheaton, 518; *Dartmouth College Case;*
Bank of U. S. vs. Dandridge, 12 Wheaton, 64;
Thompson vs Lee County, 3 Wallace, 329;
Claiborne County vs. Brooks, U. S. rep. p. 400.

In the case last cited, this question is again fully discussed, and the former decisions reviewed and adhered to. In it this language is used, "we consider such a power as entirely foreign to the purposes of their creation (counties, towns and cities) and never to be conceded except by express legislation, or by necessary, or at least very strong implication from such legislation." *Claiborne Co. vs. Brooks*, U. S. rep. 111, p. 411.

"It would be an anomaly justly to be deprecated for all our limited territorial Boards, charged with certain objects of necessary local administration to become fountains of commercial issue capable of floating about in the financial whirlpool of our large cities." *Dillon on Municipal Bonds.* "It is an admitted and undisputed doctrine that the power of public and municipal corporations to subscribe to the stock of railroad companies, and issue bonds therefor must be expressly conferred." *Dillon on Municipal Bonds*, p. 14.

The same author says, "that the courts concur with great unanimity in holding that there is no implied authority in municipal corporations to subscribe for stock in railroad companies and issue bonds for its payment, and that such power must be conferred by express grant. That to become stock-holders in such companies is foreign to the usual purposes to be subserved by municipal cor-

porations, and the authority cannot be deduced from the ordinary municipal grants, but must be specially conferred." *Dillon on Municipal Corporations*, Vol. 1, § 106.

Daniel on Negotiable Instruments, § 1520, holds the same doctrine. "Quite certain it is, we think, that there is no incidental power in a municipal corporation to borrow money, and none to execute negotiable, or other securities, for debt." *Supra*. "There is no solid ground for contending that counties, or towns, have any inherent or general power for issuing commercial securities, and they can only do so by virtue of express legislative authority, and such authority ought regularly to be recited in the bond. This is an important principle and it results from it that there is no presumption in favor of the power to issue such securities." *Dillon on Municipal Bonds*, 17, citing late cases decided in 1875 and 1876. "The power to subscribe for the stock and issue the bonds must be express." *Dillon on Municipal Bonds*, p. 55.

In support of these principles, we cite, as additional authorities, the following:

Curtis vs Leavett, 15 New York, 256;
New York Fire Ins Co vs Ely, 5 Conn., 560;
The People vs Utica Ins Co., 15 Johnson, 383;
Scott vs Hicks, 1 Cow., 513.

"The general power conferred on a municipal corporation to create a debt, is construed to mean a debt for the legitimate purposes of the municipal government." *Dillon on Municipal Corporations*, § 84 and note. The power to borrow money on the credit of the town, and to issue its bonds therefor, given in its charter, will not authorize such town to subscribe to railroad stock, and issue its bonds for the payment of such stock; but such grant of powe must be construed to mean a borrowing of money for the ordinary and usual purposes of the municipal corporation on which the power is so conferred. *Jonesboro City vs. Cairo & St Louis R. R. Co.* 110 U. S. rep. p. 196.

The courts must hold corporations strictly within the powers, and to the exercise of the powers, clearly conferred on them. *Dillon on Municipal Corporations* 89,.

It will be seen by an examination of the charter of Holly Springs—the act of November 19th, 1857, containing twenty-nine

sections—that the city government was clothed with such powers as are usually possessed by municipal corporations, established for the local government of cities and towns, and with no express authority to take stock in a railroad company, or to issue bonds for its payment. And no such power can be deduced by implication from the usual and ordinary powers of such corporations. The case is, then, brought clearly within the principles of law laid down by the authorities last cited. The only question, then, to be answered, so far as the charter of the town is involved, is what is the meaning and proper construction of the language in section two, cited by the Plaintiff in error in his declaration as follows:—"And may do and perform all other acts as natural persons, or which may be incident to the town or city corporation." This court has said "in the construction of a statute, every word is, if possible, to be given some effect. Nothing is to be stricken out if it can be avoided. It is not to be presumed that the legislature intended any part to be without meaning. *Allen vs Louisiana*, 13 *Otto*, 84 *and* 85. But words may be stricken out, if it becomes necessary to give force and effect to the main purpose and object of the law. Section two creates the corporation under the name and style of the Mayor and Aldermen of Holly Springs, gives them perpetual succession, and the right to sue and be sued. It gives them the right to purchase such property within their limits as the city government may need and require for city purposes, and to sell the same for the benefit of the city; and the right to purchase property beyond their limits for the burial of the dead, and to sell the same when the interest of the city requires it. Then comes the language under consideration, followed by the right to have, use, and change a common seal which, closes the section. Our construction of the language, "and may do and perform all other acts as natural persons or which may be incident to the town or city corporation," is that the first branch of the sentence quoted relates simply to the manner, or mode of doing the act, and not to the question of power. It does not say they shall have power to do and perform all other acts which natural persons can do, or may do, but "may do and perform all other acts as natural persons;" that is, in the mode, or manner, that natural persons do them. Suppose you add to the clause, "may do and perform all other acts as natural persons," the

words, "do them." It would then read thus—"and may do and perform all other acts as natural persons do them." Would not these words then exclude the idea of power entirely, and embrace the mode, or manner, of doing the acts which the corporation, under its charter, was authorized to do, or which were incident to the town or city government. Is not this the proper construction of the language, and may do and perform all other acts as natural persons "do them." These words, "may do them," or "do them," are necessarily implied, and the language cannot be properly construed without them. We are supported in this view by the latter part of the paragraph—"or which may be incident to the town or city corporation." If the first clause of the sentence, "and may do and perform all other acts as natural persons," was intended to invest the corporation with the power of doing and performing all other acts which natural persons can do, then it is in direct conflict with the latter clause of the same paragraph—"or which may be incident to the town or city corporation." Natural persons may do anything save what they are restrained from doing by the laws of the land. A municipal corporation, called into existence by an act of the legislature for local self-government can do nothing but what it is authorized by its charter to do, or by some other general or special act of the legislature. The powers of a natural person are inherent, original, and general, subject only to restraints imposed by law. The powers of the corporation are derivative, special, well-defined, and limited to the accomplishment of the one object, for the accomplishment of which it was called into existence. Now, if the first clause, "and may do and perform all other acts as natural persons," invested the corporation with the powers of a natural person, or was so intended, then the latter part of the sentence—"or which may be incident to the town or city corporation"—repeals the former, because it is in conflict with it, and limits the power of the corporation to such acts as are usually performed by a municipal corporation for the government of a town or city. Under this construction, both branches of the sentence cannot stand, and the latter, limiting the powers of the corporation to such as are incident to municipal corporations, must prevail, because it is the last expression of the legislative will. The last law repeals all former laws on the same subject in direct conflict

with it, and so does the last section repeal all former sections in the same law in irreconcileable conflict with it. The last expression of the legislative mind must prevail, whether it be declared in a separate, or the same act. The true construction of this language is this, that the first branch of the paragraph simply indicates the mode, or manner, of doing the acts, and the second branch is intended as a limitation on the powers of the corporation to such as are usually exercised by municipal corporations of the same character. If we are not right in our construction of it, there is a conflict between the first clause of this paragraph and twenty-seven sections of the same act which follow it. The second section in which this paragraph is found creates the corporation, gives it the right to sue and be sued, to buy and hold property for the benefit of the town, and to sell the same for the benefit of the town, gives it perpetual succession and a common seal; and if this paragraph confers on it the power to do and perform all other acts which natural persons can do and perform, why were twenty-seven sections added conferring powers on, and defining the duties, of this corporation. They were not only supererogatory, but in conflict with the idea that the clause under consideration conferred the powers of natural persons on the corporation. The powers of natural persons were all that the corporation wanted, and more than it could possibly exercise, or enjoy, if conferred. There are so many things which can be done successfully by a natural person, which cannot be done at all by corporations, that it is unnecessary to enumerate them. The idea never entered the mind of a sane legislator that a corporation could exercise all the powers, and enjoy all the rights, and discharge all the duties of a natural person.

The twenty-seven sections following the second, which includes the paragraph under consideration, limit and define well the powers of the corporation. One section gives the Mayor and Aldermen the right to levy and collect a tax for city purposes; but limits the amount to fifty cents on every Hundred Dollars worth of property for each year. This is section eleven, and no power to tax for any other purpose can be found in the charter. This Section, (§ 11) giving the power to the corporation to levy a tax to support the city government, but limiting the annual tax to fifty cents on every One Hundred Dollars worth of property, shows clearly that

the idea of conferring on the corporation the power of a natural person did not enter the legislative mind. The eleventh Section was entirely unnecessary, if the paragraph in Section two, which we are now considering, confers on the corporation the power to subscribe for stock in railroad companies, and issue bonds for its payment. Section eleven and Section two, or that part of two which we are now considering, under the construction contended for by the Plaintiff in Error are in conflict, but under our construction, they are in harmony. And if they are in direct conflict, Section eleven must prevail over Section two, under the rule of construction, *ubi supra*. In 1857, when this charter was passed, no law had ever been passed in the State authorizing the citizens of a town or city through its municipal officers to take stock in aid of a railroad company; the policy had not then been inaugurated—had not entered the legislative mind, and could not have been thought of in the preparation and passage of the act of November 19th, 1857, incorporating Holly Springs. This charter must be strictly construed, and all doubts solved in favor of the people—the tax payers—and against the right and authority of the corporation to do the act in question. *Dillon on Municipal Boads.* pp. 13 and 14;

Dillon on Municipal Corporations, § 55 and 426; and cases cited in the notes;

Hawkins vs Carroll County, 50 Miss., 735;

Simonton vs. Lanier, 71 North Carolina, 498;

Tish. Sav Inst vs. Buchanan, 60 Miss., 505;

City of Corvallis vs Carlisle, 10 Oregon, 139;

Minturn vs. Larome, 23 How., U. S. rep. 435.

In the last case, the court says, "any ambiguity or doubt arising out of the terms used (in the charter) by the Legislature, must be resolved in favor of the public. The principle has been so often applied in the construction of corporate powers, that we need not stop to refer to authorities."

Our construction of this language, is in harmony with the authorities we have cited, and we think they fully sustain us, in our position.

But if the language—"may do and perform all other acts as natural persons"—could be construed to confer on this corporation more than the ordinary powers of a municipal corporation, the

power will be confined to the subjects embraced in Section two, the purchase of property for the use of the city, for the burial of the dead, etc.. and not extended to any other subject in, or out of, the charter.

In the Court from which the case was brought, Judge R. A. Hill, in the case of *Wells us the city of Holly Springs*—a suit brought on bonds and coupons, issued by the Mayor and Aldermen of Holly Springs, to the same company, at the same time, and forming a part of the sum of Seventy-five thousand dollars, alleged to have been issued, a suit in which the same facts were involved and the same legal questions arose on the demurrer to the declaration as in this case,—delivered an able and well considered written opinion, in which he uses the following language, in disposing of the sentence now under consideration. "What was intended by these words, it is difficult to determine, but I am of the opinion it would be unsafe to construe them as conferring the power claimed. If the Mayor and Aldermen could, under this clause, subscribe for seventy-five thousand dollars, they could for one hundred millions. Without further comment, I am satisfied this clause did not authorize the subscription."

We simply ask an application of the authorities which we have cited to the facts of this case, in construing the language we are now considering. It is upon these authorities that the citizens of Municipal corporations must rely for protection against the acts of unscrupulous, treacherous, and dishonest officers. Their property can only be saved to them by a strict adherence to the doctrines of the law we have cited. "The courts have duties, the most important of which is to require corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise, and to lean against constructive powers, and with firm hands, to hold them and their officers within charter limits."—*Dillon on Municipal Corporations, pg* 89.

We now close our argument on the FIRST PROPOSITION:—That the bonds and coupons were issued without authority, either express or implied, in the charter of Holly Springs, or in the charter of the Selma, Marion and Memphis Railroad Company, or in any other act of the Legislature, general or special, and that they are null and void in the hands of all persons.

II.

Second Proposition.

They are void because they were issued in violation of theConstitution of the State of Mississippi. Section V. of Article XII. of that instrument declares that "the credit of the State shall not be pledged, or loaned, in aid of any person, association, or corporation; nor shall the State hereafter become a stock-holder in any corporation, or association." The policy of the State is clearly defined by this Article. Section XIV. of Article XII. is in the following language: "The Legislature shall not authorize any county, city, or town to become a stock-holder in, or lend its credit to, any company, association, or corporation, unless two thirds of the qualified voters of such county, city, or town, at a special election or regular election, to be held therein, shall assent thereto." The Constitution, from which the above Sections are taken, was adopted on the first day of December, 1869, by the people of the State: Before the subscription was made, the bonds issued, or the pretended election was held involved in this case.

Section V. is a prohibition on the State against loaning its credit to corporations, or associations, on any terms, or becoming a stock-holder in them. Section XIV. authorizes the Legislature to permit counties, cities, and towns to become stock-holders in, or to lend their credit to such corporations, or associations, on the conditions therein specified.

Section XIV. does not confer power on the Legislature in regard to these municipalities, but it is an express limitation on its powers.

Hawkins us Carroll Co, 50 Miss., 751;

Louisiana vs Taylor, U. S. rep. vol. 105, p. 458.

Buchanan vs Litchfield, Vol. 102, U. S. rep., p. 278;

Dixon County us Field, U. S. rep., 111, p. 89.

The case of *Hawkins us Carroll County*, 50 Miss., 751. above cited, we admit, has been overruled by this court, in the late case of *Carroll County us. Smith*, U. S. rep. 111, p, 556, on one point only. The point is this: in construing section 14 of article 12 of our state constitution, the Supreme Court of Mississippi held, that two-thirds of the whole number of qualified voters of the town or county, was necessary to make the election valid. This court holds

that two-thirds of the qualified votes cast at the election is a full compliance with the constitution. In all other respects, the case of *Hawkins vs. Carroll County* stands unaffected by the decisions of this court and in harmony with them. The point so decided is not, at all, material in this case, and in fact, does not arise in it.

Before the adoption of the Constitution of 1869, the Legislature could create these municipalities and authorize them to become stock-holders in,or to lend their credit to railroad companies,or other associations, on such terms as it might prescribe; there being no limitation imposed on it by the Constitution of 1832. "The doctrine is well settled in this court, that the Legislature of a State, unless restrained by its organic law, has the right to authorize a municipal corporation to issue bonds in aid of a railroad, and to levy a tax to pay the bonds and the interest on them, with or without a popular vote" etc. *Otoe County vs Baldwin*, U. S. rep. 111, p. 15. Section XIV. has been fully construed by the Supreme Court of Mississippi. In *Hawkins vs Carroll County*, 50 Miss., 752, it says of this Section: "Manifestly the intent was to guard and protect the local public from such burdens [of taxation previously mentioned in the opinion] unless upon the assent of two-thirds of the voters, manifested by an election." "The language assumes that the authority of the Legislature is necessary to enable a county, city, or town to become a stock-holder or lend its credit, and then puts a limitation upon Legislative discretion and authority in an important particular, viz.. the authority shall not be granted unless two-thirds of the qualified voters of such county, town, or city shall, at a special or general election, assent thereto."

Without quoting further the language of this opinion, it will be sufficient to state the points clearly settled. The Court decides that the two-thirds vote required by Section XIV., is two-thirds of the entire vote of the county, city or town,and not two-thirds of the vote cast at the election. But has been overruled on this point only, in *Carroll County vs Smith*, herein before mentioned. That this Section placed in the Constitution for the protection of the people against unjust and oppressive taxation, imposed by unscrupulous and dishonest officers, can only be complied with by a two-thirds vote of the entire qualified mass of voters in the county, city, or town. They decide further that the qualified voters

mentioned in this section are those voters whose qualifications are defined by the Constitution and laws of the State, and that the two-thirds vote must be cast at an election authorized by law, and held in pursuance of law. What, then are the qualifications of the voters? They must be male citizens, inhabitants of Mississippi, citizens of the United States, or naturalized, twenty-one years old and upwards, must have resided in the State six months and in the county, or town, one month prior to the day of election, must have been duly registered, and not disqualified by having committed any crime. Indians not taxed, idiots, and insane persons are not voters. *State Constitution, Art VII. Sec.* 1. Now let us apply the foregoing principles and Constitutional provision to the case at bar.

The declaration alledges that an election was ordered by the Mayor and Aldermen of Holly Springs to ascertain whether two-thirds of the qualified voters of said town would authorize the subscription, &c. That notice was given, and the election held, and more than two-thirds of the qualified voters voted for it, in December, 1871. But this election was not ordered and held in pursuance of any law in existence. None had ever been passed, authorizing the Mayor and Aldermen to order and hold one for any such purpose. If the people of the town were desirous of taking stock in the contemplated railroad company, they could only do so in pursuance of law and in compliance with Section XIV. of Article XII. in their State Constitution.

The plaintiff in Error does not allege in his declaration that it was ordered and held in pursuance of any law. The Mayor and Aldermen of a Municipal Corporation must aver and show the authority for their acts. They are created by law, called into existence by law, for a particular purpose, and must show legal authority for all acts done by them, or their acts will be held null and void. They can only act lawfully when the law directs them to act, and in the mode it prescribes for their action. This was a spontaneous move on the part of the Mayor and Aldermen, without the semblance of legal authority. There could be no election without a law authorizing it. Section XIV. of Article XII. requires an election authorized by law, held according to law and by proper officers. Without such an election, this Constitutional provision could afford no protection to the citizens for whose benefit it was intended.

The term, election, in Section XIV. has a legal,technical meaning. It means an election authorized by law, held in obedience to the provisions of law, and with the result announced according to law. Where there is no law for it, there can be no election. We are fully sustained in this position by the decisions of this Court, as well as by the case of ***Hawkins vs Carroll County,*** *ubi supra* In the case of *Allen vs Louisiana* 13 Otto, 86, this Court says "it is of no importance that two-thirds of the qualified voters of the city gave their assent to the subscription at the election which was held. It has been uniformly held that until the legislature authorizes an election, a vote of the people cannot be taken which will bind the municipality, or confer upon the municipal authorities the power to make such subscription. The Legislative authority to obtain the popular assent is as essential to the validity of the election as it is to the subscription."

In the foregoing case the Constitutional limitation of Missouri on the General Assembly is an exact copy of Section XIV., of Article XII., on the Legislature of Mississippi. To the same effect, is the case of the *County of Jasper vs Ballou*, 13 Otto, 751 and 752. Also the case of *Dixon County vs. Field*, U. S. rep. 111; p. 83. In this case, authority was clearly given to Dixon county, by a general act of the Legislature, to issue bonds in aid of a railroad company, after submitting the question to the legal voters of the county at an election held in pursuance of law, and obtaining the assent of two-thirds of the legal voters to the proposition. The amount of the bonds to be issued, was limited by the terms of the general law, and by Section 2, of Article 12, of the State Constitution, to ten per cent on the assessed value of the property of the county. The election was held in pursuance of the law, and the assent of the legal voters obtained, and bonds were issued to a larger amount than ten per cent, but less than fifteen per cent. The defense set up to them, was that they were issued without authority of law. In answer to this defense, the Plaintiffs set up, and relied on a proviso to Section 2 of Article 12 of the State Constitution, in the following words: "provided that any city or county may, by a two-thirds vote, increase such indebtedness five per cent, in addition to such ten per cent." Article 12, and a preceding proviso had provided for the legal vote of the county, and limited the amount of

the bonds to be issued to ten per cent, on the assessed value of the county; and so did the general law of the State. This court held in construing the proviso above set out, that it did not confer *proprio vigore* the power on the county to issue bonds to a larger amount than ten per cent on the assessed value of the county, but simply authorized the Legislature to confer by law such power. That a vote on the proposition by the legal voters of the county was necessary, and that that vote must be authorized by an act of the Legislature. That the proviso was not self-executing, but required all necessary legislation to carry it into effect. That a law authorizing the donation to the railroad company, and a law authorizing the election to be held, and the two-thirds vote to be obtained, were indispensable, and neither having been passed, that the bonds were issued without legal authority and in violation of the State Constitution. This case fully sustains us in our first and second propositions. Article 12 of the Constitution of Nebraska construed in this case is, in many respects, like Section 14, of Article 12 of the Constitution of Mississippi, invoked in the case at bar.

The proceeding then ordered by the Mayor and Aldermen, and called by the Plaintiff in Error, in his declaration, an election, was really, as shown in the declaration, nothing more than a mass-meeting, or mob. Who held the election, and where was it held? Who voted at it? Men, women, and children, idiots and Indians might have done so; there was no law to restrain them. Who made the returns, and by what law was the person making them restrained from stuffing the ballot boxes? How often did each person in the mass-meeting, vote? There was no law to punish such a person for voting twenty times if he chose to do so. These are all pertinent questions. Of what avail are Constitutional provisions for the protection of the citizen, if such proceedings can be endorsed as elections? The bonds could never be lawfully issued, nor could the subscription for the stock be lawfully made, until the assent of two-thirds of the entire number of voters within the corporate limits of Holly Springs had been obtained under Section XIV of the Constitution. The power to make the subscription and issue the bonds for the stock in the Railroad company could only be conferred on the Mayor and Aldermen by the two-thirds vote taken in pursuance

of law, under the constitution. Nothern Bank vs Porter Township, 110 U. S. rep. p. p. 112, 113, 114. There was but one way known to the Constitution and laws of the State of obtaining that assent, and that was by an election authorized by law and held in pursuance thereof, To sanction this proceeding, in defiance of law and in violation of the State Constitution, would be an anomaly in judicial proceedings in this country.

We think, therefore, that the subscription made, and the bonds issued now in controversy are null and void, because no law was ever passed authorizing an election to be held to ascertain whether two-thirds of the qualified voters of the town were in favor of the proposition, and that no election was held, or could be held to ascertain that fact. They are null and void, even if the charter of Holly Springs had conferred on the Mayor and Aldermen full power to make the subscription and issue the bonds, because that power could only be exercised under, and in compliance with, Section XIV., of Article 12. That assent was never obtained, and no law was ever passed to authorize it to be obtained. The Constitution prescribes the mode in which the assent of the people of the town shall be taken on the proposition—by an election, special or regular—and thus excludes petitions, mass-meeting, mobs, and all other modes. *Expressio unius, exclusio alterius est.* The framers of the Constitution, in requiring an election and a two-thirds vote of all the qualified voters, intended to exclude assent obtained by petition, mass-meeting, or any other mode. They intended that it should be obtained in the most impressive and authoritative mode known to civil government. The term. "election," is used here in its legal, technical sense.

But suppose a law had been passed authorizing an election, and that an election had been held in pursuance of such law, and the two-thirds vote hadbeen obtained, still, without further legislation, the Mayor and Aldermen could not subscribe for the stock and issue the bonds.

Section XIV. of Article XII· does not confer the power on them to subscribe, but says the Legislature may do it on a certain condition. It limits the power of the Legislature to act until a certain hing has been done—the vote taken, and then if the vote be in favor of the proposition, it requires affirmative legislation to author-

ize the Mayor and Aldermen to do what the two-thirds vote indicates should be done.

In *Hawkins vs. Carroll County*, the Court says—"The language assumes that the authority of the Legislature is necessary to enable the county, city, or town to become a stock-holder or lend its credit, and then puts a limitation upon legislative discretion and authority in an important particular, viz., the authority shall not be granted "unless two-thirds of the qualified voters of such county, city or town, at a special or regular election, shall assent thereto." The same doctrine is held in Dixon county vs Field above cited. Such authority was never given. We now pass from the *Second Proposition* because we think it is too clear to require further consideration.

III.

Third Proposition.

The bonds and coupons are null and void because they were issued without authority, and in violation of the Constitution of the State, and being void they cannot be vitalized, legalized, or made valid by any curative act passed by the Legislature.

Once a nullity, always a nullity, is the doctrine of the law. Voidable acts may be made valid, but void acts cannot be. Curative, legalizing acts are based on the cardinal principle that there was authority or power given for doing the act in question, but that some irregularity, informality, or defect, appears in its execution.

The Plantiff in Error, in his declaration, refers to, and sets out, the fourth section of an act passed by the Legislature of Mississippi, on the 16th of March, 1872. That Section is as follows: "That all subscriptions to the capital stock of the said Selma, Marion, and Memphis Railroad Company, made by any county, city, or town in this State, which were not made in violation of the Constitution of this State, are hereby legalized ratified, and confirmed."

This Section is found in an act entitled, "An Act to Facilitate the Construction of the Selma, Marion, and Memphis Railroad." The act contains five sections. The first section authorizes the company to change the guage of the road; the second extends cer-

tain benefits of sudsidy granted to other roads by an act of May 13th, 1871, to the Selma, Marion, and Memphis Company; the third authorizes the State Auditor and levee boards to convey certain lands sold for taxes prior to that time to the Selma, Marion and Memphis Railroad Company; the fourth appears above in full; and the fifth, and last section authorizes the Company to build a bridge across the Tombigbee River, at Aberdeen. It will be seen from the title of the act, and from its provisions, that the object and purpose of the Legislature, in passing it, was not to legalize the bonds, but to confer other important benefits on the Company, and the fourth section was the result of after-thought, and a mere incident to the main object of the law. See *Acts of* 1872 pp. 313 and 314.

We think the act is utterly worthless, and can give no validity to the bonds and coupons in controversy. The fourth section is vague, indefinite, and uncertain, and does not, in its terms, embrace anything but the subscription. It does not recite the action of the Mayor and Aldermen, and does not mention the election. The whole proceedings should have been set out in the act. See curative acts in *Gelpeke vs Dubuque*, 1 Wallace, 177; *Thompson vs. Lee County*, 3 Wallace, 328; *Bissell vs. Jefferson*, 24 Howard, 291. Everything intended to be made regular and legally binding should be mentioned in the curative or legalizing act.

The bonds and coupons are not mentioned in it, and are not attempted to be legalized, and no power is conferred on the corporation to levy and collect taxes to pay the subscription even, in this, or any other act.

Suppose the fourth section did legalize and make valid the subscription, which we deny, it certainly did not legalize and render valid the bonds and coupons now sued on.

The power to make the subscription does not include the power to issue bonds in payment of it, nor does a curative act legalizing and confirming a subscription, legalize and confirm bonds issued in payment of it, unless the bonds are mentioned and included in express terms, in such curative act.

Wells vs Supervisors, 12 Otto, 625;

Ogden vs. County of Davies, Id. 638, 639, and 640.

Here we might safely close the argument on our THIRD PROPOSITION. This suit is brought on coupons involving the validity of the bonds, and not on the subscription. But we propose to go further. Section IV., above set out, says it is not intended to ratify and confirm any subscription made in violation of the State Constitution. This subscription was made and the bonds issued in violation of the State Constitution; both were made without an election called and held by authority of law to ascertain whether two-thirds of the qualified voters of the town favored the proposition, in violation of Section XIV., of Article XII, of the State Constitution. Then the bonds sued on are excepted from, and taken clearly out of, Section IV. in express terms. Ratifying or curative acts can only cure irregularities, or defects, in executing, or carrying out, a power clearly conferred; but cannot be held to supply the want of power for doing the particular act which had not been previously given. Section IV., in this act of 1872, has been construed by the Supreme Court of Mississippi and held not to apply to this case, or to any of the subscriptions made at the time this was, but to apply to a class of cases arising under an act passed by the Legislature in 1870. That Section IV. must be construed to be prospective and not retroactive in its operation, and that it is unconstitutional when made retroactive and applied to this class of cases.

Sykes vs. Columbus, 55 Miss., 143 and 144.

Cutler vs. Board of Supervisors, 56 Miss., 120.

As applicable to this case, the Legislature could not pass a constitutional law, validating and confirming either the subscription or the bonds. The Constitution, Section XIV., of Article XII., required a legal election to be held, and the assent of two-thirds of all the qualified voters within the corporate limits of the town, to be obtained before the Legislature could authorize the subscription and the bonds to be made and issued. This was not done.

In *Aiten vs. Louisiana*, a law, authorizing the city, on a majority vote taken at an election held in pursuance of law, was declared unconstitutional because the State Constitution required a two-thirds vote. 13 Otto, 84 and 85.

If by an act of the Legislature, one provision of the Constitution may be dispensed with, it follows, as a necessary corollary, that by

a series of acts, the whole Constitution may be set aside. Could the Legislature have passed a law free from Constitutional objections, which authorized this town to subscribe for the stock and issue the bonds without any election, or with an election requiring only a majority of the qualified votes? It could not, and no lawyer will insist on it. Then it could not, by a subsequent law, ratify and make valid that which it could not, in the first instance, dispense with. This Court says: "If the Legislature possessed the power to authorize an act to be done, it could, by a retrospective act, cure the evils which existed because the power thus conferred had been irregularly executed."—*Thompson vs Lee County*, 3 *Wallace*, 328; *Thompson vs Perrim*, 13 *Otto*. 813, 814, *and* 815.

"The thing wanting, or failed to be done, and which constitutes the defect in the proceeding, is something, the necessity for which the Legislature might have dispensed with by a prior statute, then it is not beyond the power of the Legislature to dispense with it by a subsequent statute, and if the irregularity consist in doing some act, or in the mode or manner of doing some act, which the Legislature may have made immaterial by prior law, it is equally competent to make the same immaterial by subsequent law."—*Cooly's Constitutional Limitations*, ¶ 371.

The rule is clearly stated in both of the foregoing authorities. It was well stated by Judge Hill, in his opinion, deciding this case in the court below—"If the Legislature had the power to authorize the act before it was done, it may afterwards ratify it." But an act of the Legislature authorizing the Mayor and Aldermen to make the subscription and issue the bonds without the assent of two-thirds of the qualified voters in the town, obtained according to law, as provided by Section XIV. of Article XII. of the State Constitution, would have been utterly worthless, and as a necessary sequence the act of 1872, attempting to ratify, must be so.

Again. The corporation of Holly Springs either became a stock-holder in the Selma, Marion and Memphis Railroad Company at the time the subscription was made, and the bonds issued, or it never became one. It did, or did not, loan its credit to that Company at that time. If it did become a stock-holder, and loan its credit to the Company, then there was no necessity for a ratifying, legalizing, curative law: It was then sufficiently bound for all purposes. To constitute a stockholder there must have been a

lawful subscription. There could be no lawful subscription without a contract. There could be no contract without parties capable of contracting; and we have shown that a municipal corporation could not make the contract, or the subscription without express legislative authority, and that such authority, was never conferred on this corporation. Then there was no valid contract, and no subscription. And the Legislature could not two years or more afterwards, by this legalizing, curative act of 1872, make a contract for the corporation of Holly Springs, which for the first time had an existence. It could only legalize and ratify a contract which the corporation had the legal authority to make, and had made, but in the making of which, or the execution of the power, some informalities or irregularities appeared.

IV.

Fourth Proposition.

The payment of interest, and voting the stock, for sometime by the Defendant in Error, does not amount to an estoppel, nor does it impart any validity to the bonds and coupons. The taxes were levied and collected, and the interest paid, and the stock voted by the same unauthorized agents, who, without lawful authority, ordered a fraudulent election, announced the result, made the subscription, and issued the bonds. The payment of the taxes and voting the stock, were, but a continuation of the same illegal scheme of plunder. Can the first act done by an unauthorized agent be ratified by a second act of the same character done by the same agent? In other words, can an unauthorized agent ratify his own illegal acts by a continuation of acts of the same character? Can the first unauthorized act be plead as an authority for a second one? Such a thing is unknown to legal science, or common sense.

In *Wells vs. Holly Springs*, a case like this in all respects, Judge Hill said, on this point, after stating the facts that interest had been paid, and the stock voted, and the corporation estopped, as claimed, "the answer to which is, they were mere agents, and incapable of ratifying their own unauthorized acts, which acts were not subsequently approved, ratified, and validated, either by the Legislature, which created them, or by the inhabitants and tax-payers, for whose benefit they were created, many of whom are women and minor

children, and who are not allowed, even in a legal election, a voice in authorizing impositions of heavy burdens on their property, whilst many of those who do authorize those impositions bear little, if any, of the burdens thus imposed on others."

What is the language of this Court, on this point. "It is also contended that if the bonds in suit were issued without authority, their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification." * * * * * * "But the answer to them all is, that the power of ratification did not lie with the supervisors. A ratification is, in effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying, possesses the power to perform the act ratified. The supervisors possessed no authority to make the subscription, or issue the bonds in the first instance, without the previous sanction of the qualified voters of the county. The supervisors in that particular were the mere agents of the county. They could not, therefore, ratify a subscription, without a vote of the county because they could not make a subscription in the first instance, without such authorization. It would be absurd to say that they could without such vote by a simple expression of approval, or in some other indirect way give validity to acts when they were directly, in terms, prohibited by statute from doing those acts, until after such vote was had. That would be equivalent to saying that an agent, not having the power to do a particular act for his principal, could give validity to such act by its indirect recognition."—*Marsh vs. Fulton County*, 10 *Wallace*, 683 and 684.

Again. "We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the Legislature was without power to authorize the issue of these bonds, and its statute attempting to confer such authority is void, the mere payment of interest, which was equally unauthorized, cannot create of itself a power to levy taxes, resting on no other foundation than the fact

that they have once been illegally levied for that purpose."—*Loan Association vs. Topeka*, 20 *Wallace*, 667.

"Several payments of interest have been made on these bonds from funds derived from taxation, but this can make no difference."—*Sherrard vs. Lafayette County*, 2 *Cent. Law Journal*, 348.—This opinion was by Dillon and Krekel.

Herman, in his law of estoppels, lays down the doctrine clearly, that the acts of Municipal Corporations, which are *ultra vires*, can not be ratified by their agents, or officers, and the doctrine of estoppel can not be applied in such cases.—*Herman on Estoppels*, ¶¶ 543, 556 and 558.

Judge Cooley announces the same doctrine. *Cooley on Constitutional Limitations*, 217 *and note.*

The doctrine of estoppel may be invoked against a corporation where informalities, irregularities, or imperfections exist in executing a power clearly conferred, but it can never be applied where the authority or power to do the particular act in question has never been given. In this case the corporation was a mere agent of the State, created for the convenience of local, municipal, government, and it made the subscription and issued the bonds without authority. It — the agent — could not ratify its own illegal acts, in any event; and certainly, not by a repetition of them. The State—the principal—could not ratify the acts of its agent, the corporation, in this case, because they were performed in violation of the State Constitution, as we have endeavored to show. The taxpayers of the town, more deeply interested than all other parties, did not ratify the subscription and issue of the bonds. The subscription was made and the bonds issued, without their assent. The taxes were then levied and collected, and the interest paid, and the stock voted, without their consent. The collection of the taxes was a matter of coercion, and not of volition, on the part of the taxpayers. The naked question is, can an agent without the semblance of authority, do an act which the principal, in the first instance, could not do, and could not afterwards ratify; and can that agent ratify his own illegal acts by continuing to do other illegal

acts, of a kindred character? Such a question can receive but one answer, and is too clear to admit of argument before an intelligent court.

V.

Fifth Proposition.

The questions involved in this case have all been decided by the Supreme Court of Mississippi. The Constitutional provision—Section XIV., of Article XII.—has been construed. The curative, ratifying act of the Legislature of March 16th, 1872, has been fully passed upon, and declared unconstitutional when applied to this class of cases. The class of contracts to which the one declared on belongs, has been examined and passed upon. In short, everything presented by the record in this case has been decided in favor of the Defendant in Error by the Supreme Court of Mississippi, except the clause taken from the second section of the Charter of Holly Springs, to-wit: "and may do and perform all other acts as natural persons, or which may be incident to the town or city corporation." The case of *Sykes vs. the City of Columbus* covers the case involved, except the clause last above quoted, which has never been before that court. When the following cases have been examined, nothing else will be found unsettled.

Hawkins vs. Carroll County, 50 Miss., 735;

City of Vicksburg vs. Lombard, 51 Miss., 126—7;

Sykes vs. the Mayor and Aldermen of Columbus, 55 Miss., 115;

Cutler vs. the Board of Supervisors, 56 Miss., 115.

Will this Court follow the decisions of the Supreme Court of Mississippi on the questions involved? Its own decisions heretofore made will furnish an answer to this question.

"Where the construction of a State Constitution or law has become settled by a decision of the State Courts, the Courts of the United States will, as a general rule, accept it as evidence of what the local law is." *Pana vs. Bowler*, 17 *Otto*, 54. In this case, the question between the Supreme Court of Illinois and this Court

was the following: The Supreme Court of Illinois held that a mere irregularity in holding the election to get the vote of the people before the municipal bonds could be issued, where the power to hold the election and issue the bonds, was clearly conferred by law, rendered the bonds void in the hands of an innocent holder for value. This Court did not concur in that decision, and could not have done so, without setting aside all of its own decisions on that point, to the contrary, at least, fifty in number.

In the case of Burgess vs. Seligman, in the same volume, this Court says: "The existence of two co-ordinate jurisdictions, in the same territory, is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State Courts, it necessarily happens that in the course of their decisions, certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and statutes. Such established rules are always regarded by the Federal Courts, no less than by the State Courts themselves as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence." 17 *Otto*, 33.

All the decisions on this subject by this Court, beginning with *McKeen vs Delancy's Lessee* 5 Cranch, 22, and coming down to Thompson vs Perrim, 13 Otto, 806—a very large number—are cited in the case of Burgess vs. Seligman, 17 Otto, in a note on pages 34 and 35. No case uses language stronger against the Defendant in Error than the foregoing, and many of them use language more favorable. The rule then we understand to be this: That this court will follow the Supreme Court of Mississippi in construing the State Constitution—Section XIV., of Article XII.—and in construing the curative, legalizing act of March 16th, 1872, and the contract declared on. If we are right in this, then there is nothing left in this case upon which the Plaintiff in Error can reasonably base a hope of success. The questions are *res adjudicata.*

We have now disposed of the five propositions involved in the case. The demurrer to the declaration raises the legal questions only, for the consideration of this Court, and we have confined our argument closely to the questions so presented; but it is due to the citizens of Holly Springs that one other matter, but partially presented by the record, should be noticed. If all the facts had been set out in the declaration, so as to show the point involved fully to the court, we should pass it unnoticed; but the facts do not so appear.

We know that this Court will only consider the questions of law, and not the hardship or morality of the particular case before it. In Buchanan vs. Litchfield, 12 Otto, 293, it said—"waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law can not, with safety to the public, be disregarded in order to remedy the hardships of special cases." We concede and insist that the validity of the contract declared on in this case, must be determined by the application of legal principles alone. But the Plaintiff in Error states in his declaration that the Defendant in Error, "received the regular and proper certificates therefor, (of the stock subscribed) which they still hold, and have never surrendered, or offered to surrender."

From this statement of a single fact, arising out of a large transaction, consisting of many facts, inferences might be drawn discreditable to the citizens of the town, and which would be pronounced unjust and unwarranted, when all the facts were known. The facts are that the Selma, Marion and Memphis Railroad Company failed, became bankrupt, judgments and decrees were rendered against it, and it was sold, and sold for a very small sum. The work was suspended, stopped, and still continues so. The road was not built and has not been to the present time. The whole thing became a wreck in 1873, and is still so.

The town paid three installments of interest on the bonds, amounting to $9000, which were paid every six months. To this extent, besides the cost of levying and collecting the taxes, the town has been the actual loser. It has received nothing, but paid out more than ten thousand dollars on this illegal contract. And as to the ten thousand dollars so paid out, it is, of course, without remedy. But the certificate of stock issued to the corpo-

ration of Holly Springs was but a transcript from the books of the Selma, Marion and Memphis Railroad Company, the subscription was made on the books of that company, and the certificate was issued as a matter of convenience to the stockholder only. Now when this railroad was sold, its books were sold with its other effects, and the books showing the subscription were in the hands of the purchasers, and the creditors of this bankrupt company, had access to them, if they desired to institute legal proceedings against the corporation of Holly Springs. The subscription on the books and not the certificate of stock, would have been made the basis of such litigation.

Of what value, then, was the certificate of the stock? New certificates might have been issued every day from the books, the original subscription in the hands of the Selma, Marion and Memphis Railroad Company, so long as that company existed, and after the sale, from the books in the hands of the purchasers of the road. This stock was of no value, neither was the certificate—and how could the return of either, or both, have benefited the purchasers of the road, or injured its creditors? Does the law require either a natural person, or a corporation, to do a vain thing—to return a paper of no value? The alleged subscription, and issue of the bonds and coupons, have been a great hardship on the citizens of the town, but we invoke no aid from that source, and ask only that which is given by the law itself. Looking to the decisions made by this, the Court of last resort in our government, as well as to the decisions of other courts of great learning in the law, we cannot see how the bonds and coupons, involved in this case, can be sustained, when their validity is tested by the principles so laid down.

FEATHERSTON & HARRIS,

Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1884.

J. ADDISON HAYES,
Plaintiff in Error,
vs.
MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS,
Defendants in Error.

No. 200.

In error to the District Court of the United States for the Northern District of Mississippi.

BRIEF FOR DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1884.

J. ADDISON HAYES,
Plaintiff in Error,
vs.
MAYOR AND ALDERMEN OF THE CITY OF HOLLY SPRINGS,
Defendants in Error.
No. 200.

In error to the District Court of the United States for the Northern District of Mississippi.

BRIEF FOR DEFENDANT IN ERROR.

This is an action of debt brought by J. Addison Hayes against the mayor and aldermen of the city of Holly Springs, in the State of Mississippi, to recover upon a number of coupons overdue and unpaid, which were attached to certain bonds issued by said city in aid of the Selma, Marion and Memphis Railroad Company.

The declaration sets out both the facts and the laws of the State of Mississippi, upon which the plaintiff relies, as showing prior legislative authority for the issuance of the bonds and subsequent legislative ratification of them.

The bonds and coupons are also set out in full in the declaration.

The city of Holly Springs defends by demurrer, and for causes of demurrer assigns the following:

1. The declaration does not aver nor show that the defendant had any power or authority to subscribe to the capital stock of the Selma, Marion and Memphis Railroad Company.

2. The declaration does not aver nor show that the defendant had any power and authority to issue the bonds and coupons therein described, in payment of any subscription to the capital stock in said railroad company, or for any other purpose.

3. The said declaration does not aver nor show that the defendant had any power or authority to hold the election required by the constitution of the State of Mississippi, to ascertain whether the legal voters of said corporation would consent to the alleged subscription to the capital stock of said railroad company.

4. Because said declaration does not aver nor show that the mayor and aldermen of said city had any power and authority on the —— day of ————, 1871, to order that an election be held on the 30th day of December, 1871, to ascertain whether two-thirds of the qualified voters of said city would assent to a subscription, by said city, for seventy-five thousand dollars, or any other sum to the capital stock of said railroad company, and to issue the bonds of said city for the payment of said subscription as alleged in the declaration.

5. Said declaration does not aver, or show, that said alleged election of December 30, 1871, was held under any lawful authority, or that it was a valid, legal election.

ARGUMENT.

The demurrer raises the question of the legislative authority of the defendant to issue the bonds and coupons in controversy. It is not a question involving an irregular or defective execution of a power, but the defendant, by its demurrer, denies that it had the legislative authority under any circumstances, or upon any conditions, to issue the bonds and coupons in controversy. It is well settled that this naked question is unaffected by the *bona fides* of the holder of the

bonds and coupons, or by any recitals in the bonds, or by any acts upon the part of the corporation recognizing the validity of the bonds. Want of legislative authority cannot be supplied by estoppel nor rendered immaterial by the *bona fides* of the holder.

See Ottawa *vs.* Carey, 108 U. S., 123.
Sykes *vs.* Mayor and Aldermen, 55 Miss., 115.
Lewis *vs.* City of Shreveport, 108 U. S., 287.
Northern Bank *vs.* Porter, 110 U. S., 615.

Counsel for plaintiff suggests, rather than seriously argues, that the constitution of the State of Mississippi authorized the ordering and holding of the election; the subscription to the capital stock of the railroad company and the issuance of bonds and coupons in payment thereof.

The fourteenth section of article twelve of the State constitution, relied on as giving all this authority, is in the following language:

"The legislature shall not authorize any county, city or town to become a stockholder in, or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto."

This clause is an inhibition upon the legislature and not a grant of power.

See Jarrolt *vs.* Moberly, 103 U. S., 589.

Nor is the suggestion that authority to hold this election and make the subscription is found in the charter of Holly Springs worthy of any more serious consideration.

The clause relied on is as follows:

* * * "The mayor and aldermen may do and perform all other acts as natural persons, or which may be incident to town or city corporations."

The true meaning of this clause is seen when you strike out the word "or" after the word "persons" when it reads,

"the mayor and aldermen may do and perform all other acts as natural persons which may be incident to town or city corporations."

If the construction suggested by opposing counsel is the true one, and the mayor and aldermen of Holly Springs could do and perform all acts, which natural persons could do or perform, then we have a municipal corporation in Mississippi startlingly unique.

Every business enterprise known among men can be carried on by the mayor and aldermen of Holly Springs with the money wrung by taxation from men, women and children. But we need not pursue the subject further. No such authority as would authorize the issuance of the bonds and coupons in controversy will ever be allowed by implication to municipal corporations.

Sykes *cs.* Mayor and Aldermen, 55 Miss., 115.
Mayor *cs.* Ray, 19 Wallace, 475.

The bonds in this case to which the coupons sued on were attached, were issued without any shadow of legislative authority, and were, therefore, when issued absolutely null and void.

But plaintiff in error insists that even though they were void when issued, they have, since their issuance, been validated by legislative ratification.

To maintain this proposition he relies on an act passed by the legislature of the State of Mississippi on the 16th of March, 1872, which is as follows:

* * * "Section 4. That all subscriptions to the capital stock of the said Selma, Marion and Memphis Railroad Company made by any county, city or town in this State, which were not made in violation of the constitution of this State, are hereby legalized, ratified and conjoined."

We deny that this act was intended, or does in terms ratify the subscription of the city of Holly Springs to the capital stock of said railroad company. Certainly if the bonds

and coupons are ratified it is by implication, for the act in terms applies only to subscriptions. The ratification of the subscription is not a ratification of the bonds.

Wells *vs.* Supervisors, 102 U. S., 630.

But this subscription was, as we will show, in violation of the constitution of the State and, therefore, not within the purview of this act. The constitution of the State requires that an election shall be held to determine whether a municipal subscription should be made. Legislative authority is requisite for holding an election.

"It has been uniformly held that until the legislature authorizes an election a vote of the people cannot be taken which will bind the town, or confer upon town authority the power to make subscription. The legislative authority to obtain the popular assent is as essential to the validity of an election as it is to the subscription."

Allen *vs.* Louisiana, 103 U. S., 80.

"An election held without legislative authority and any action of city officials based on it has no legal force or effect."

Quincy *vs.* Coke, 107 U. S., 553.

No authority for holding the election is found in the charter of the town, nor in the Mississippi code of 1871, then in force, nor in the charter of the railroad. The sections of the code to which opposing counsel refer in their brief, prescribe rules and regulations for holding elections authorized by law, but do not themselves authorize any election. The charter of the city of Holly Springs also prescribes the manner in which elections authorized therein shall be held, but the only elections authorized thereby are for city officers. Therefore the act upon which plaintiff in error relies as ratifying the bonds and coupons in question is utterly inapplicable, and the bonds and coupons, void when issued, have not been the subject of any legislative attempt at ratification, nor could the legislature have validated them--had it attempted to do so. Since they were issued in payment of a